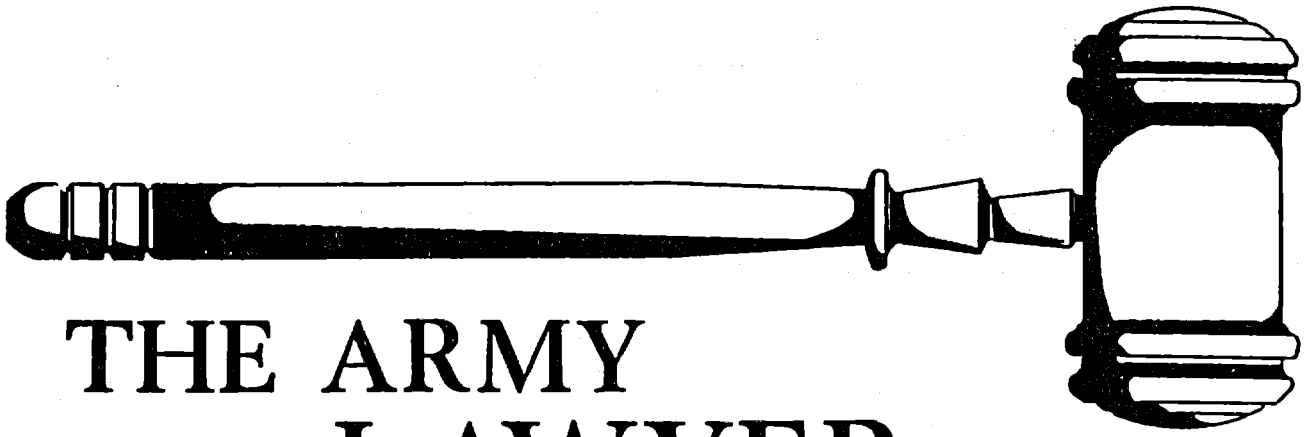

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The Electronic Fund Transfer Act: An Effective Shield and A Sharp Sword!

Major David L. Pointer
OIC, Baumholder Branch Office, OSJA 8th ID

Introduction

Few subjects are nearer or dearer to the hearts of our soldier-clients or their family members than the subject of money. As a legal assistance attorney, are you prepared to provide assistance to your clients[1] when they experience a monetary setback at the hands of an "ugly teller"?[2]

How would you advise the concerned "clients" to proceed in the following hypotheticals?

—Private Regmon has just returned from two long weeks in the field, only to discover that his wall locker had been broken into and ransacked sometime during his absence. Private Regmon recounts that he has been unable to locate either his automated teller machine (ATM) bank card or his newly issued account's personal identification number (PIN),[3] though he distinctly remembers securing both items in an envelope in his wall locker prior to leaving for the field. Private Regmon promptly reported the loss to his on-post banking facility, the Fort Swampy USA National Bank, only to learn that his $750 bank balance has been zeroed out by a series of unexplained withdrawals that began the day after he departed for the field. Private Regmon wants to know if the bank manager was right in refusing to conduct an investigation concerning the loss "in view of (Regmon's) carelessness in collocating his ATM card and PIN in violation of Paragraph 1.5 of the Fort Swampy USA National Bank ATM Customer Agreement." Is Private Regmon really out $750?

—Colonel Gold just returned stateside after a five-month TDY trip abroad in fulfillment of his duties as a Strategic Arms Limitations Talks advisor. In the course of checking the mail that had accumulated in his absence, Colonel Gold came across a four-month-old Fort Swampy USA National Bank statement containing a glaring ATM entry error. He is sure that the date on the statement was during the week he went skiing in Germany. He remembers using an ATM card issued by his stateside bank to withdraw cash from an on-post ATM located in Germany. He further remembers how pleased he was to learn that his stateside bank was the current United States military banking services contract holder in Germany and that his ATM agreement with the bank permitted him to use his stateside ATM card at the bank's overseas branches as well. Colonel Gold possesses a dated ATM transaction receipt plainly showing that the amount withdrawn was $500, not $5,000 as indicated on his stateside bank statement. Colonel Gold promptly reported the error to his bank, only to be politely but firmly informed by the bank's manager that his [Gold's] report was untimely "in view of the bank's policy limiting its liability entirely to those bank statement errors reported within sixty days of statement appearance, regardless of circumstance." When Colonel Gold pointed out that his Fort Swampy USA National Bank ATM Customer Agreement provides for a time limit extension when "ATM errors not discoverable due to extended travel or absence from home occur," the bank's manager simply shrugged his shoulders and said that the provision was inapplicable to the bank's ATM transactions overseas. Colonel Gold is hopping mad and wants to know if his chances for recovery would improve if he were to file suit against the bank?

Neither of these hypotheticals is far fetched, nor is your reflexive response in reaching for your state's statutory version of the Uniform Commercial Code (UCC)[4] or your Truth in Lending Act (TILA) materials.[5] Unfortunately, neither of these sources will correctly resolve the issues raised by our clients. Why? Because, statutorily, the UCC is applicable to paper-based transactions,[6] the TILA is applicable to credit transactions,[7] and electronic fund transfer transactions fall somewhere in

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[1] Army Reg. 27-3, Legal Services: Legal Assistance, para. 2-5a(4) (10 Mar. 1989).

[2] The nickname given the automated tellers serving the customers of a Texas Community Federal Savings and Loan Association. *See* Gaffney v. Community Fed. Sav. & Loan, 706 S.W.2d 530, 532 n.2 (Mo. Ct. App. 1986).

[3] 12 C.F.R. pt. 205, Supp. II §§ 205.2-1, 205.6-4 (1990). *See also* N. Penny & D. Baker, The Law of Electronic Fund Transfer Systems 6-2 to -3 (1980) (This explains that a typical ATM transaction is accomplished by inserting a magnetically encoded plastic card containing an individually assigned validation code, the PIN, into the ATM's card slot. The consumer then enters the PIN sequence on the ATM's console. The sequence entered must match the PIN sequence encoded on the card to successfully complete the transaction.)

[4] Uniform Commercial Code (9th ed. 1978) [hereinafter U.C.C.]. The U.C.C. has been adopted by all states except Louisiana; however, not all states have adopted the U.C.C. in its original form. The applicable state version of the U.C.C. should always be consulted. *See* J. White & R. Summers, Uniform Commercial Code 1 (2d ed. 1980).

[5] Truth in Lending Act materials include the basic statute, 15 U.S.C. §§ 1601-67 (1988); 12 C.F.R. pt. 226 (1990) [hereinafter Regulation Z]; and the Official Staff Interpretations of Regulation Z, 12 C.F.R. pt. 226, Supp. I (1990).

[6] *See* Delbrueck & Co. v. Manufacturer's Hanover Trust Co., 609 F.2d 1047, 1051 (2d Cir. 1979) (holding that the U.C.C. was not applicable because it does not specifically address electronic transfers); *accord* EVRA Corp. v. Swiss Bank Corp., 673 F.2d 951, 955 (7th Cir.), *cert. denied*, 459 U.S. 1017 (1982) (while the U.C.C. "could be stretched to include electronic fund transfers, ... they were not in the contemplation of the code draftsman.") *See also* Vergari, *Articles 3 and 4 of the Uniform Commercial Code in an Electronic Fund Transfer Environment*, 17 San Diego L. Rev. 287 (1980); Comment, *The Electronic Fund Transfer Act—A Departure from Articles Three and Four of the Uniform Commercial Code*, 1980 Wis. L. Rev. 1008 [hereinafter Comment].

[7] 15 U.S.C. § 1601(a) (1988) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.")

between,[8] overlapping only in certain limited instances.[9] The purpose of this article is to provide a brief overview of the Electronic Fund Transfer Act (EFTA),[10] one of the most consumer-oriented pieces of banking legislation ever enacted,[11] and to effectively equip legal assistance attorneys with the tools to do battle with one of the toughest opponents one can encounter: the banking industry.

Applicability

The first and most logical question at the outset is, "Who does the EFTA regulate?" Answer: Financial institutions (FIs), including state or national banks, savings and loan associations, mutual savings banks, credit unions, or any other person who, directly or indirectly holds an account belonging to a consumer, or who issues an access device and agrees with a consumer to provide electronic fund transfer services.[12] "State" is defined as "any State, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the above."[13] The EFTA also applies to all foreign banks and foreign bank controlled commercial lending companies doing business within the United States.[14]

Does the EFTA apply overseas? The EFTA covers *all* stateside FIs providing electronic fund transfer services, wherever those services are performed. The EFTA's definition of a FI is broad enough to encompass electronic fund transfer services provided by a stateside national bank's overseas branch banking operation.[15]

The EFTA will apply to most of the electronic fund transfer situations confronting legal assistance clients overseas because, by regulation, Department of Defense overseas banking services contracts must be negotiated with United States banking institutions.[16] If an overseas client has established an electronic fund transfer account with a foreign FI, the EFTA does not apply unless its protections are incorporated as part of the FI's agreement with the client.

Key EFTA Definitions

An "electronic fund transfer" is:

> [A]ny transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, that is initiated through an electronic terminal, telephone, or computer or magnetic tape for the purpose of ordering, instructing, or authorizing a

[8] Both the U.C.C. and the Truth in Lending Act were in existence when Congress enacted the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r (1988). One need read no further than 15 U.S.C. § 1693(a) to understand Congress's rationale for enacting a separate and distinct statute. They declare that the need exists "due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions, and intermediaries in electronic transfers undefined."

[9] 12 C.F.R. §§ 205.5(c), 205.6(d), and Supp. II § 205.6-9 to -11 (1990). Though a meaningful discussion of the overlap issue exceeds the scope of this paper, this issue is carefully examined by Lieutenant Norman Werth, USN, in N. Werth, *EFT/Credit Transactions-Which Regulation Applies?* (1986) (unpublished research paper, available in The Judge Advocate General's School, U.S. Army, Administrative & Civil Law Division, Legal Assistance Branch office).

[10] The Electronic Fund Transfer Act consists of more than just the broad statute set forth at 15 U.S.C. §§ 1693-1693r (1988). Congress assigned the authority and responsibility for prescribing the regulations necessary to accomplish the statute's purpose and enforce compliance to the Board of Governors of the Federal Reserve System at 15 U.S.C. § 1693b (1988). This mandate is accomplished at 12 C.F.R. pt. 205 (1989) [hereinafter Regulation E]. Updates are published in the Federal Register between C.F.R. revisions. Additionally, Official Staff Commentaries to Regulation E, published as supplements to pt. 205, are designed to apply and interpret the requirements of Regulation E and to substitute for individual staff interpretations. 15 U.S.C. § 1693m(d) provides that good faith reliance upon the interpretations provided by the Official Staff Commentary shields a financial institution from civil liability.

[11] 15 U.S.C. § 1693(b) (1988) ("It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objection of this subchapter, however, is the provision of individual consumer rights."); 12 C.F.R. § 205.1(b) (1990) ("This regulation is intended to carry out the purposes of the Act, including, primarily, the protection of individual consumers engaging in electronic transfers.") *See also* Hsia, *Legislative History and Proposed Regulatory Implementation of the Electronic Fund Transfer Act*, 13 U.S.F. L. Rev. 299 (1979); Taffer, *The Making of the Electronic Fund Transfer Act: A Look at Consumer Liability and Error Resolution*, 13 U.S.F. L. Rev. 231 (1979). *But see* Broadman, *Electronic Fund Transfer Act: Is the Consumer Protected?* 13 U.S.F. L. Rev. 245 (1979); Budnitz, *The Impact of EFT Upon Consumers: Practical Problems Faced by Consumers*, 13 U.S.F. L. Rev. 361 (1979).

[12] 12 C.F.R. § 205.2(i) (1990).

[13] *Id.* § 205.2(k).

[14] 12 U.S.C. § 3106a (1988) (requires foreign banks and commercial lending companies operating agencies or branches in the United States to comply with all applicable federal and state laws in the conduct of its business).

[15] Congress has made the Board of Governors of the Federal Reserve System (hereinafter Board of Governors) the chief enforcer for the Electronic Fund Transfer Act, 15 U.S.C. § 1693b, and chief regulator for national banks that establish foreign branches, 12 U.S.C. § 611a (1988) ("To provide for the establishment of international banking and financial corporations operating under Federal supervision ... the Board of Governors ... shall issue rules and regulations under this subchapter consistent with and in furtherance of the purposes....") These rules and regulations are found at 12 C.F.R. pt. 211 (1990). 12 C.F.R. § 211.2(k) (1990) (clarifies the continued applicability of stateside banking laws to an overseas branch banking operations by defining a "foreign branch" as "an office of an organization (other than a representative office) that is located outside the country *under the laws* of which the organization is established, at which a banking or financing business is conducted.") (emphasis added). While there may be FIs operating under some exception to the definition stated above, subject to some regulatory agency other than the Board of Governors, the scope of this paper is confined to a discussion of applicability of the EFTA to the most likely FI to be awarded a Department of Defense (DOD) military banking services contract overseas: a stateside national bank authorized to operate a foreign branch. Incidentally, at the time this paper was written, the current (DOD) military banking services contract holder for Germany, Greece, and The Netherlands was a Board of Governors regulated foreign branch of a stateside national bank: Merchant's National Bank, Indianapolis, Indiana.

[16] Army Reg. 210-135, Installations: Bank and Credit Unions on Army Installations, para. 3-1 (1 June 1988) [hereinafter AR 210-135].

financial institution to debit or credit an account. The term includes, but is not limited to, point-of-sale transfers, automated teller machine transfers, direct deposits or withdrawals of funds, and transfers initiated by telephone. It includes all transfers resulting from debt card transactions, including those that do not involve an electronic terminal at the time of the transaction. The term does not include payments made by check, draft, or similar paper instrument at an electronic terminal.[17]

The significance of the EFTA legislation is not readily apparent to most consumers of banking services until a "glitch" develops that affects their account. Such "glitches" are defined as "errors"[18] under the EFTA. "Errors" include the following: 1) an unauthorized electronic fund transfer; 2) an incorrect electronic fund transfer to or from the consumer's account; 3) the omission from a periodic statement of an electronic fund transfer affecting the consumer's account which should have been included; 4) a computational error by the financial institution; 5) the consumer's receipt of an incorrect amount of money from an electronic terminal; 6) a consumer's request for additional information or clarification concerning an electronic fund transfer or any documentation required by this title; or 7) any other error described in regulations of the Board.[19]

One particular type of error, the "unauthorized electronic fund transfer" (unauthorized EFT), receives special attention throughout the EFTA. To ensure instant recognition, an unauthorized EFT is narrowly defined as follows:

> [A]n electronic fund transfer from a consumer's account initiated by a person other than the consumer without actual authority to initiate the transfer and from which the consumer receives no benefit. The term does not include any electronic fund transfer (1) initiated by a person who was furnished with the access device to the consumer's account by the consumer, unless the consumer has notified the financial institution involved that transfers by that person are no longer authorized, (2) initiated with fraudulent intent by the consumer or any person acting in concert with the consumer, or (3) that is initiated by the financial institution or its employee.[20]

It is apparent that the banking "glitches" described by Private Regmon and Colonel Gold are cognizable as errors under the EFTA. This is significant because once the client notifies the FI, its officers, employees, or agents[21] of an error, the EFTA shifts the burden of resolving the error from the consumer to the FI.

Error Resolution

How does the FI customer know how to give the FI proper and timely notice upon discovery of an error? Simple! The EFTA requires the FI to provide each of its electronic fund transfer account holders with written error resolution instructions when the account is established and annually thereafter.[22] Once the customer notifies the FI of an error, the FI has ten business days (twenty business days if the transaction occurs overseas)[23] to investigate the consumer's allegation of error and inform the consumer of the outcome. Alternatively, the FI can elect to take up to forty-five calendar days (ninety calendar days if the transaction occurs overseas) to conduct its investigation so long as the FI provisionally recredits the consumer's account for the amount in controversy plus interest within ten business days (twenty business days if the transaction occurs overseas) of the error notice. Should the FI determine that an error occurred, it has one business day following its determination to recredit the account, including any accrued interest or fees imposed as a result of the error. Should the FI determine that no error occurred, the FI must provide the consumer with a written explanation for its finding. The consumer is entitled to request and the FI is required to provide copies of any documentation the FI relied upon in making its determination. The FI can debit an amount provisionally recredited to the consumer's account upon its finding of "no error," provided notice is given to the consumer. The FI must continue to honor drafts drawn against the recredited amount for up to five business days following transmittal of the debit notice without charge for overdrafts.[24] The one exception to these rules is the special treatment accorded those errors categorized as unauthorized EFTs. An FI that has fully complied with the EFTA's error resolution requirements has no further

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[17] 12 C.F.R. § 205.2(g) (1990).

[18] 15 U.S.C. § 1693f(f) (1988). *See also* 12 C.F.R. § 205.11(a) (1990).

[19] *See supra* note 10.

[20] 12 C.F.R. § 205.2(l) (1990).

[21] 12 C.F.R. § 205.6(c) (1990).

[22] 12 C.F.R. §§ 205.7-5.8 (1990). *See also* 12 C.F.R. pt. 205, App. A, § A(2)-(4) (sets out model disclosure clauses), Reg. E Supp. II, §§ 205.7-2 to -20, 205.8-1 to -8.

[23] 12 C.F.R. § 205.11(c)(4) (1990).

[24] *Id.* § 205.11(f).

investigative responsibilities with respect to any reassertion of the same error by the consumer.[25] So what keeps the FI from simply declaring "no error" on the basis of a cursory investigation?

Treble Damages

The EFTA allows an injured consumer to seek and a court to award treble damages upon the court's finding that 1) the FI did not provisionally recredit a consumer's account within ten business days (twenty business days if the transaction occurs overseas) *and* failed to either conduct an investigation of the error in good faith *or* have a reasonable basis for its finding of "no error"; *or* 2) the FI knowingly and willfully concluded that "no error" had occurred contrary to the evidence available to the FI at the time.[26] So, if the Fort Swampy USA National Bank boldly concludes "no error" without conducting the statutorily required investigation, it runs the risk of incurring treble damages in addition to actual damages. Treble damages alone would amount to $750 × 3 for Private Regmon and $4,500 × 3 for Colonel Gold.

Now I know what you're thinking! "That's nice to know, but that requires going to court, incurring court costs and attorney fees, and relies far too heavily on the court's indulgence." I couldn't agree more! The point is this: Why not use this provision as a springboard for negotiations with the FI on behalf of your client? If you put the FI on notice as to its error resolution responsibilities under the EFTA, submit your proposal for negotiations in writing, have it served on the bank, and the bank still refuses to act in good faith, how will that look to the court? Either way, the odds of resolving the error in your client's favor increase appreciably!

Special Treatment

As mentioned earlier, not all errors are treated equally under the EFTA; unauthorized EFTs receive special treatment. The rationale for singling out unauthorized EFTs is grounded in the concept of risk allocation. Congress believed the banking industry is in the best position to prevent loss through error in almost every conceivable instance, except unauthorized EFTs. In the case of the unauthorized EFT, the only way an FI can prevent or reduce loss is if the consumer reports the fact that the potential for unauthorized account access exists due to the loss or theft of an ATM card. What better way to enlist the consumer's cooperation than to provide a monetary incentive to encourage prompt reporting?[27]

Here's how this risk allocation scheme works under the EFTA: the consumer's liability is 1) limited to $50 if the consumer gives the FI notice within two business days of learning of the loss or theft; 2) not to exceed $500 for "unauthorized EFTs" occurring after two business days of learning of the loss or theft if the consumer delays FI notification; and 3) potentially unlimited for unauthorized EFTs occurring more than sixty calendar days after an unauthorized EFT appears on the consumer's periodic statement.[28] Even under this scheme the consumer's interests are protected in several important ways.

Special Protections

The EFTA places the entire burden of proving that consumer liability is appropriate on the FI. The FI can absolve itself of liability by proving that the transfer was authorized. In that case the consumer, not the FI, would absorb any "loss."[29] If the transfer was unauthorized, the FI must show that it has met all assigned responsibilities, that it has provided all the required disclosures under the EFTA in a timely manner, and that any additional unauthorized EFTs could have been prevented if the FI had been given timely notice by the consumer, *before* any liability accrued to the consumer.[30] Strict statutory compliance is required and any deviation, no matter how small, absolves the consumer of liability.

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[25] *Id.* § 205.11(h).

[26] 15 U.S.C. § 1693f(e) (1988).

[27] *See* Comment, *supra* note 6, at 1023-24 (citing S. Rep. No. 915, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 9403, 9408) ("(1) [T]he $50/500 limits do provide incentives to consumers to be careful in using access devices and reporting their loss or theft; (2) the allocation formula serves as an incentive for financial institutions to develop more effective means of identifying authorized users of EFT systems; and (3) financial systems are in the best position to prevent losses in the long run."). *See also* Greguras, *The Allocation of Risk in Electronic Fund Transfer Systems for Losses Caused by Unauthorized Transactions*, 13 U.S.F. L. Rev. 405 (1979).

[28] 12 C.F.R. § 205.6(b) (1990); *see also* Reg. E Supp. II, § 205.6-1 to -11 (staff analysis of disclosure requirements and the impact of failing to disclose).

[29] *See, e.g.*, United States v. Goldblatt, 813 F.2d 619 (3d Cir. 1987) (Appellant's continued assertion of an unauthorized EFT from his personal account and subsequent use of the money provisionally recredited to his account after he had full knowledge that his son was responsible for the unauthorized EFT resulted in the affirmance of his conviction for bank fraud and larceny. There was sufficient evidence of collusion between father and son to support the lower court's finding that the withdrawal had been authorized.)

[30] 15 U.S.C § 1693g(b) (1988); *see also* 12 C.F.R. § 205.6(a)-(b) (1990) (additional Board-imposed FI requirements before liability accrues to the consumer include 1) that the device used to gain unauthorized access was an accepted access device; and 2) FI provision of a means to confirm the identity of the consumer to whom the access device was issued).

In the event of extenuating circumstances, such as extended travel or hospitalization, the two business day and sixty calendar day time limits must be extended for a reasonable time under the circumstances.[31]

Consumer liability is fixed under the EFTA. Any attempt to enlarge the scope of liability or circumvent the restrictions on liability by agreement between the FI and the consumer or by state or federal statute other than the EFTA is specifically prohibited.[32] So much for any fine print hidden in the FI's ATM consumer agreement.

Perhaps the hardest EFTA concept for most bankers to grasp is that the EFTA risk defrayal scheme imposes liability mechanically without regard to fault. The fact that an unauthorized EFT would not have occurred but for the consumer's negligence is simply not a relevant factor in assessing liability![33] Could this concept, tied in with the EFTA's consumer liability enlargement prohibition, be Private Regmon's salvation?

Special Resolution

The error resolution process for an unauthorized EFT works the same way as the error resolution process for any other electronic fund transfer error, with one important exception. If the FI chooses to exercise the forty-five or ninety calendar day investigation option, it can withhold $50 from the sum provisionally recredited to the consumer's account if 1) a reasonable basis exists for the FI's belief that an unauthorized EFT has occurred; and 2) the FI has satisfied the EFTA's consumer liability assessment requirements.[34] This, of course, sets the FI up for a hard fall if it has failed to comply with the provisions in *any* way and is challenged. Remember, the treble damages provision discussed earlier applies to unauthorized EFTs. The treble damages provision is perhaps even more effectively employed here, given the FI's added burden of proving entitlement due to the statutory requirement for strict and total compliance.

Enforcement

The EFTA places a veritable arsenal of enforcement mechanisms, capable of swaying even the most recalcitrant banker, at the disposal of the informed consumer. In addition to the treble damages provision previously discussed, the EFTA includes other important enforcement provisions.

Administrative enforcement: Use of this mechanism is solely within the province of the regulatory agency with statutory oversight responsibility for the FI in question. The easiest way to resolve any uncertainty as to the identity of the proper regulatory point of contact is to either ask the FI or contact the Board of Governors of the Federal Reserve System.[35]

Never underestimate the power that the regulatory agencies exercise over their assigned FIs. These agencies are to FIs what the IRS is to the errant taxpayer. They can tie up a wayward FI in red tape to the point that it ceases to function for any purpose other than to answer the agency's inquiries. A regulatory agency can make its presence on the FI's premises a day-to-day reality by ordering the FI to close its doors so the agency's examiners can conduct a full compliance audit.[36] In the most egregious of cases, the agency even has the power to revoke the FI's charter or license to operate[37] and the power to direct suspension or removal of an FI director or officer.[38]

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[31] 12 C.F.R. § 205.6(b)(4) (1990).

[32] 15 U.S.C. § 1693g(c)-(e) (prohibition on enlargement of liability) (1988); 12 C.F.R. § 205.12 (1990) (preemption standards and procedures for inconsistent state laws); *see also* 15 U.S.C. § 16931 ("No writing or other agreement between a consumer and any other person may contain any provision which constitutes a waiver of any right conferred or cause of action created by this subchapter.")

[33] 12 C.F.R. § 205.6(b) (1990); Reg. E Supp. II § 205.6-6.5 ("The extent of the consumer's liability is determined by the promptness in reporting loss or theft of an access device or unauthorized transfers appearing on a periodic statement. Negligence on the consumer's part cannot be taken into account to impose a greater liability than is permissible under the act and Regulation E.")

[34] 12 C.F.R. § 205.11(c)(2)(i) (1990).

[35] *Id.* § 205.13(a); *see also* Public Servs., Div. of Support Servs., Bd. of Governors of the Fed. Reserve Sys., Alice in Debitland 16 (1980) (gives the postal addresses for all federal regulatory agencies with EFTA enforcement authority; a copy can be obtained by writing the Board of Governors of the Federal Reserve System, Washington, D.C. 20551).

[36] *See, e.g.*, 12 U.S.C. § 602 (1988) (for foreign branches of national banks the Board of Governors "may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best."); 12 C.F.R. § 4.11(a) (1990) (the Comptroller of the Currency may "cause such [bank] examinations to be made more frequently as he determines necessary. An affiliate of a national bank any [sic] [may] also be examined.") While other regulatory agencies are empowered to enforce the provisions of the EFTA using The Federal Deposit Insurance Act, 12 U.S.C. § 1818 (1988), I have purposely limited my discussion to the Board of Governors and the Comptroller of the Currency to give the reader some idea of the regulatory agency enforcement mechanisms currently in use.

[37] *See, e.g.*, 12 U.S.C. § 93(a) (1988) ("If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any provisions of [this chapter], all the rights, privileges, and franchises of the association shall be thereby forfeited."). *But see* 15 U.S.C. § 1693o(a) ("Compliance with the requirements imposed under this subchapter shall be enforced under—(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], in the case of (A) national banks, by the Comptroller of the Currency; ..."); 12 U.S.C. § 1818 (o) (1988) (requires the Comptroller of the Currency to appoint a receiver for any national bank whose FDIC insured status has been terminated). 12 U.S.C. § 1818 (i)(2)(i) (1988) (permits the Comptroller of the Currency to impose a civil penalty of up to $1,000 per day for each day that an agency imposed final order is violated by a national bank, its director, employee, agent, or other person participating in the bank's affairs).

[38] *See, e.g.*, 12 U.S.C. § 1818 (e) (1988).

In order to enlist the agency's support, the legal assistance attorney need only present the agency with evidence of a clear violation of the agency's guidelines or mandatory compliance provisions. In most cases, the legal assistance attorney can gain an obstreperous bank president's cooperation by simply asking a regulatory agency representative to call and remind the bank's president that the agency has an interest in the proper resolution of even the smallest of consumer concerns. Because of the ethical[39] and medical dilemmas posed,[40] resist the temptation to have your regulatory point of contact conclude the conversation with the offending FI officer with the question, "How long do you think it would take for our bank examiners to reach your location by plane?" The agency's call alone will have your recalcitrant FI officer imagining the worst.

FI liability: If an FI fails to complete an electronic fund transfer to or from a consumer's account on time or in the correct amount in accordance with its agreement, then the FI is liable for the resulting proximate damages, unless 1) through no fault of the FI, the account contains insufficient funds; 2) funds within the account are subject to legal process or other restrictions; 3) the transfer will exceed the account's established credit limit; 4) the electronic terminal has insufficient cash to complete the transaction; or 5) as otherwise provided by the EFTA. Further, the FI is not liable for damages caused by its failure due to a reasonably unavoidable act of God, circumstances beyond its control despite due diligence, or technical malfunctions known to the consumer at the time of transfer initiation. The FI's liability is limited to proven actual damages so long as its failure was unintentional, resulting from a bona fide error despite reasonable precautions taken to avoid such an error.[41]

Personal civil liability: Any person who fails to comply with any provision of the EFTA is liable to the consumer for actual damages; court costs and attorney's fees as determined by the court; and 1) not less than $100 nor more than $1,000 for an individual action or 2) up to the lesser of $500,000 or 1% of the defendant's net worth per failure to comply by the same person, without limitation upon the minimum recovery the court may assign as to each member of the class. The court must consider the nature, frequency, and persistence of the noncompliance, and the extent to which that noncompliance was intentional. Additional factors for the court to consider in the case of a class action include the defendant's resources and the number of people adversely affected as a result of the defendant's noncompliance. No liability will accrue for unintentional failures or noncompliance failures that are a result of a bona fide error occurring despite reasonable precautions taken to avoid such an error. This provision does not limit recovery under either the treble damages provision or the FI liability provision.[42]

Criminal liability: Knowingly and willfully 1) failing to disclose required information; 2) giving false or inaccurate information; or 3) failing to comply with any provision of the EFTA can result in up to 1 year imprisonment and a $5,000 fine. EFTA violations affecting interstate or foreign commerce involving $1,000 or more aggregated over the course of a one-year period can result in up to ten years of imprisonment and a $10,000 fine.[43]

Practice Pointers

As if the arsenal were not already large enough, here are a few additional points that may help to sway the balance in a client's favor.

First, always review the FI agreement carefully. Read it once for content and then read it against the EFTA's model disclosure clauses to see if the FI has fully and accurately provided the mandatory disclosures.[44] Remember that any FI failure to fully and strictly comply with the disclosure requirements means a finding of no liability for your client and, under the right circumstances, treble damages.

Second, review all FI correspondence carefully against the EFTA to ensure compliance with all notice time limits, provisional recrediting rules, and all determination disclosure rules. Request copies of all documentation relied upon by the FI in making its decision whenever the FI resolves a complaint in its own favor.

Third, if the FI refuses to cooperate with your good faith attempts to resolve a complaint in accordance with the EFTA, try the following:

(a) If the FI is an on-post facility, contact the installation's FI liaison officer. If he is the least bit reticent about

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[39] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Comment to Rule 3.1 (31 Dec. 1987) ("The action is frivolous, however, if the client desires to have the action taken *solely* for the purpose of harassing or maliciously injuring a person ... .") (emphasis added).

[40] *See* Tennant, Langeluddecke, Fulcher, and Wilby, *Acute and Chronic Life Event Stress In Coronary Atherosclerosis*, 32 J. Psychosomatic Res. 13 (1988).

[41] 15 U.S.C. § 1693h (1988).

[42] *Id.* § 1693m(a). *See, e.g.*, Bisbey v. D.C. Nat'l Bank, 793 F.2d 315 (D.C. Cir. 1986) (The court held in favor of the consumer despite the fact that she benefitted from the bank's error. The bank had failed to provide copies of the documents relied on by the bank and written notice of the results of the investigation, even though both were required under the EFTA. The consumer was awarded nominal damages and attorney's fees.)

[43] 15 U.S.C. § 1693n (1988).

[44] 12 C.F.R. pt. 205, app. A (1990).

offering the services of his office, contact the Inspector General's office. If this fails to obtain the desired results, then it may be time to elevate the complaint to the post command level. The key point to remember about on-post FIs is this: an installation commander is vested with the authority, by regulation, to terminate an FI's presence on post at any time for unsatisfactory service or regulatory inconsistency.[45]

(b) Consider seeking support via the Comptroller of the Army's technical chain. Start with the appropriate major command (MACOM) comptroller's office and work your way up to the Assistant Comptroller of the Army for Finance and Accounting, Banking Policy, at Fort Benjamin Harrison and, if need be, all the way through to the Army Comptroller. Still no success? There is an almost inexhaustible number of offices that handle complaints in this area, and it may take a directive from superiors to get the lower level offices moving. For example, the Assistant Secretary of the Army (Financial Management) has staff responsibility for all FIs on Army installations worldwide and is an invaluable contact as the Army's liaison to both the banking industry and the FI regulatory agencies.[46]

(c) If it becomes necessary to go outside Army channels, the Assistant Secretary of Defense (Comptroller) is responsible for coordinating all Department of Defense domestic and overseas banking programs.[47]

(d) Given the right circumstances, it may be advantageous to have the client write to a congressional representative and/or senator. They may in turn forward multiple inquiries to the appropriate house and senate subcommittees (armed services, banking, etc.). Because this option has a tendency to generate more smoke than fire, is a time-consuming process, and can yield mixed results, it is definitely a weapon of last resort.

Fourth, as previously discussed at length, the virtues of invoking regulatory agency support are great. It is important to bear in mind that their power extends well beyond the EFTA administrative sanctions outlined. They can, at least in the case of Federal Deposit Insurance Corporation (FDIC) members or in the case of Comptroller of the Currency chartered national banking associations (insured and uninsured), issue a cease-and-desist order prohibiting or mandating specified bank related conduct of an offending FI, FI director, FI employee, or FI agent. Though these orders are not effective until thirty days after service on a nonconsenting FI, the agency can require immediate compliance by issuing a temporary cease-and-desist order and, if necessary, enforce that order in United States District Court.[48] All this can be accomplished without sending your client to a downtown attorney or obtaining the staff judge advocate's, The Judge Advocate General's, or the United States Attorney's permission to appear in court![49]

Fifth, the legal assistance attorney can bypass an uncooperative FI regulatory agency, in the case of an FDIC-insured FI, by seeking the support of the FDIC's board of directors. If the board determines that an FI has engaged in unsound banking practices or violated an FDIC-imposed rule, regulation, law, order, condition, or written agreement, the board can issue a statement of correction to the offending FI and its regulatory agency. If the FI fails to implement the required corrective actions in a timely fashion, the board can terminate its status as an FDIC-insured bank.[50]

Finally, the combinations of sanctions and enforcement mechanisms that can be fashioned are almost limitless. These options represent only a portion of the tools available to the creative advocate or the harried consumer. If these options do not fit your style of advocacy or the needs of your client, seek additional alternatives: check the statutes, talk to other attorneys, talk to your banking friends, etc. Remember, the banking and finance industry is among the most heavily regulated in the world, and absolute compliance with all the rules is unlikely.

Of course, all this EFTA enforcement stuff sounds great in theory, but does it really work?

"War Story" Time

My experience with the awesome power of the EFTA occurred while I was stationed at Fort Hood, Texas, in 1985. A number of soldiers and their legal assistance attorneys encountered many difficulties attempting to have their errors, including unauthorized EFTs, resolved in accordance with the EFTA. The president of the offending bank even refused to negotiate with any more "JAG types," refusing my further attempts to communicate. At my staff judge advocate's request, I contacted the bank's regulatory agency, the Comptroller of the

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[45] AR 210-135, para. 2-3a(3) (termination of stateside banking offices); *id.* para. 4-2b (termination of credit unions for cause). *But see id.* para. 3-5 (termination of overseas military banking facilities).

[46] *Id.* para. 1-4d.

[47] *Id.* para. 1-4a(1).

[48] 12 U.S.C. § 1818(b)-(d) (1988); 12 C.F.R. § 19.18-21 (1990).

[49] AR 27-3, para. 2-5a (SJA determination required before providing additional services); *id.* para. 2-9 (court representation policy and limitations).

[50] 12 U.S.C. § 1818 (1988).

Currency (Washington, D.C., office), and explained our dilemma.

The issue that most interested the agency representative was our discovery that the bank had enlarged the scope of consumer liability by adding "fault" language to the EFTA model disclosure language contained within the bank's ATM agreement. I mailed the agency representative a copy of the agreement at her request and she called me back within the week to outline her proposed strategy for ending the bank's EFTA "cold war." She explained that she intended to call the bank president that day, identify herself and her enforcement position with the Comptroller of the Currency's office, briefly explain the consumer protection aspects of the EFTA, and enlist his cooperation and pledge of support in resolving all outstanding complaints in compliance with the EFTA. Assuming that all went well, she then planned to ask him to edit and reprint the bank's ATM agreements, using the model disclosure language without variance, and to destroy the bank's current stock of ATM agreements. The plan sounded great to me, but I warned her that the bank's president had been less than cordial whenever the discussion turned to his or the bank's responsibilities under the EFTA.

It came as no surprise to learn later that the bank's president refused to listen to his regulatory agency's position. He demonstrated his displeasure with their lack of support for his position by hanging up on the agency representative in mid-conversation, which was not his wisest course of action. Unfortunately for me, I left Fort Hood before this EFTA matter was resolved. I gave the agency representative my successor's name and left with her assurances that she would see the matter successfully resolved.

When I saw the agency representative at a luncheon about two years ago, I asked her how the Fort Hood EFTA matter had concluded. She related that shortly after I left Fort Hood, she dispatched bank examiners to conduct a full compliance audit. During the course of the audit, the bank's stockpile of ATM agreements was confiscated and destroyed and more than a few unsound banking practices were discovered. During the Comptroller of the Currency's follow-up discussions with the bank's board of directors, the board accepted the bank president's resignation as a showing of their commitment to comply with the banking laws, thereby avoiding charter revocation proceedings.[51]

Does the EFTA work? It sure did at Fort Hood and it should work for you and your clients as well!

The Hypotheticals

If I have done my job in presenting the EFTA material, you already know the answers to the hypotheticals and may want to skip right to the conclusion. For those of you who are still with me, follow along carefully because this is my last chance to turn you into an EFTA "expert."

Private Regmon: The Fort Swampy National Bank manager has two choices here. He can either get out his EFTA materials or get out his wallet!

The error complained of here is an unauthorized EFT. Such errors are cognizable under the EFTA and the bank is required to conduct an investigation in good faith and report the outcome of its investigation to Private Regmon within ten business days. The bank can elect to take up to forty-five business days to conduct its investigation if Private Regmon is so notified and the bank provisionally recredits his account in the amount of the error no later than ten business days after the bank was notified of the error. The bank might conceivably withhold $50 from the amount provisionally recredited to Private Regmon's account using the special error resolution treatment rule applicable to unauthorized EFTs. Prior to withholding the $50, the bank must be certain that it has strictly and accurately complied with all EFTA disclosure requirements and that a reasonable basis exists for its belief that an unauthorized EFT has occurred.

Given the facts of the case, it appears that Private Regmon's ATM card and PIN were stolen from his wall locker without his knowledge while he was in the field. It also appears that Private Regmon promptly reported the theft of his ATM card, thereby limiting his potential liability to $50. The evidence in this case strongly indicates that the losses sustained were unauthorized EFTs and, unless the bank can prove otherwise, it must recredit Private Regmon's account in the amount of $700.

The bank's attempt to enlarge the scope of consumer liability by adding a negligence standard to its ATM agreement was a costly mistake. If the bank did in fact withhold $50 from the amount provisionally recredited to Private Regmon's account, it must now recredit the $50 because of its failure to comply with the EFTA's disclosure requirement. If Private Regmon decides to press the issue, the bank may be held liable for treble damages as a result of the improper withholding. Further, unless the bank can show that the EFTA violations were the result of unintentional conduct and bona fide error, the bank is potentially subject to FI liability as well as sanctions imposed by the FDIC, its regulatory agency, and the

[51] Telephone interview with Mary Ellen Saunders, Consumer Specialist, Consumer Examinations Division, Comptroller of the Currency (Mar. 9, 1989). Ms. Saunders graciously took the time to listen as I read the "War Story" portion of this paper to her. She confirmed the accuracy of the events as reported therein and as she had related them to me two years ago.

command. The bank manager's liability exposure is even greater, given the potential for personal civil liability, criminal liability, as well as sanctions imposed by the FDIC, the bank's regulatory agency, and the command.

Colonel Gold: First, calm Colonel Gold down and explain that suing the bank is not necessarily the best or the most efficient way to ensure recovery. The error in this case is plainly a bank error subject to the normal error resolution rules. All the legal assistance attorney has to do is get the bank to follow the rules. The attorney should try to negotiate with the bank first and escalate pressure as the situation dictates.

What must the bank do? Again, the bank must conduct an investigation of the alleged error in good faith. Should the bank elect to take ninety calendar days to conduct its investigation because the transaction occurred overseas, the bank must provisionally recredit Colonel Gold's account in the amount of the error within twenty business days or face the very real prospect of a suit for treble damages for lack of a reasonable basis to support its belief that no error occurred. Colonel Gold's ATM receipt virtually dictates provisionally recrediting his account and gives the bank more than enough proof to resolve any disagreement it may have with its overseas branch.

As for the overseas issue, the bank manager need only read the definition of a FI to learn that the EFTA applies to his bank with or without the bank's written acknowledgment of that fact in its ATM agreement with Colonel Gold. If after reading the definition of a FI, the bank's president still doubts the EFTA's applicability to the bank's overseas operation, simply remind him that the Board of Governors of the Federal Reserve System considers stateside banking laws, which include the EFTA, applicable to foreign branches of stateside national banks and provide him with a copy of the applicable regulatory provision. If that still does not convince the bank's president, let the agency representative explain the EFTA's applicability. Further, as to the issue of extending the error reporting limits, the EFTA provides that the bank must extend the limits in the event of extended travel. Colonel Gold's right to an error reporting extension accrues whether the bank's ATM agreement provides for an extension or not. Under the circumstances, the bank manager's position and expectations are unreasonable. Any attempt to enlarge the consumer's scope of liability is invalid under the EFTA.

The bank will have to recredit Colonel Gold's account in the amount of $4,500, unless it can prove that no error occurred. Further, unless the bank can show that the EFTA violations were the result of unintentional conduct and bona fide error, the bank is potentially subject to FI liability as well as sanctions imposed by the FDIC, its regulatory agency, and the command. The bank manager's liability exposure includes the potential for personal civil liability, criminal liability, and sanctions imposed by the FDIC, the bank's regulatory agency, and the command.

Conclusion

So there you have it, one the most powerful consumer advocacy tools available to the legal assistance attorney.

The EFTA's strict compliance standards, no-nonsense disclosure requirements, and generous reporting limits effectively shield our legal assistance clients from liability. The vast array of enforcement mechanisms available to ensure absolute compliance with both the letter and spirit of the EFTA is staggering. It is perhaps the sharpness of the sword and the devastating nature of its swath that urges caution and the adoption of a responsible attitude in its use. Never swing more widely than is necessary to accomplish the best results for your client and never hesitate to swing as widely as necessary to ensure the protection and financial well-being of our stock-in-trade: our soldiers and their family members.

Presolicitation Discussions and the "Unfair" Competitive Advantage

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Introduction

During the presolicitation phase of the acquisition cycle, government personnel are torn between two conflicting demands. On the one hand, they are told that the Competition in Contracting Act (CICA) requires them to maintain an open dialogue with industry in order to understand the capabilities of the marketplace and to express contractual requirements in a manner that achieves full and open competition. On the other hand, however, they are warned that there are numerous complex laws with severe penalties that require them to control the flow of information to the extent necessary to preserve the integrity of the procurement process.

To achieve both of these seemingly conflicting objectives, the rules must be understood and applied wisely. Unfortunately, the confusion surrounding the procurement integrity section of the 1989 Office of Federal Procurement Policy Act Amendments has temporarily

blurred our collective vision.[1] The general consensus is that this law has had a chilling effect upon government communications with industry.

Although the procurement integrity law has been suspended until December 1, 1990, its chilling effect lingers because of the general uncertainty in this area and the prospect that new restrictions may be forthcoming. The purpose of this article is not to summarize the procurement integrity provisions, but to address the current state of the law so that government representatives can continue to communicate effectively with industry while preserving the integrity of the contracting process.

The Three Basic Prohibitions

Government personnel cannot disclose proprietary information or source selection information to unauthorized persons. While these two basic prohibitions are contained in the new procurement integrity law, they are not new.[2] The new law basically added additional penalties to preexisting prohibitions. For the most part, communications that were lawful before the new law remain lawful. Nevertheless, the ominous threat of added penalties and the heightened publicity have caused personnel to err on the side of caution by unduly restricting their dialogue with industry.

Simply stated, proprietary information is that which a contractor properly marks as proprietary and which is not otherwise available to the government in unrestricted form.[3] Source selection information is either information that is properly marked source selection information or, regardless of whether it is marked, information that falls within one of nine narrow categories.[4] Although questions do arise, requirements personnel seem to find these two rules reasonably understandable and therefore relatively workable.

By far the bulk of presolicitation information that concerns government technical personnel is neither proprietary nor source selection information. Rather, it falls within the vast realm of program information that is routinely generated long before issuance of the solicitation. While the prohibition against unauthorized disclosure of advanced acquisition information is not complex, it is far more difficult to apply because it requires the exercise of judgment.

Advanced Acquisition Information

The Army Standards of Conduct regulation states that DA personnel are prohibited from disclosing "any information concerning future DA requirements" except pursuant to "authorized procedures."[5] That regulation does not describe those authorized procedures. To locate them, one must look to the procurement regulations and the interpretative decisions of the General Accounting Office (GAO). Scattered throughout those regulations and decisions are rules that are aimed at striking the proper balance between the conflicting demands of maintaining an open dialogue with industry and preserving the integrity of the contracting process.

What Information Can Be Discussed?

At the outset, it must be stressed that the rules do not prohibit government personnel from gathering information from contractors. It has long been recognized that the government must understand the capabilities of industry so that its minimum needs can be expressed in a way that does not unduly restrict competition.[6] In order to gather information, however, one must often give information. For example, when the government asks a contractor, "What are your capabilities?" the usual reply is, "What are your needs?"

For those reasons, the procurement regulations allow us to explore the marketplace and identify potential sources of supply.[7] We may also conduct limited discussions with potential sources.[8] During those discussions, we can disclose *general* information about our mission and needs.[9] We can even identify areas of interest for the

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[1] Section 27 of the Office of Federal Procurement Policy Act Amendments (to be codified at 41 U.S.C. 423).

[2] *See, e.g.*, 18 U.S.C. § 1905 (1988); 18 U.S.C. § 641 (1988); Army Reg. 600-50, Standards of Conduct for Department of the Army Personnel, para. 2-1g (28 Jan. 1988) [hereinafter AR 600-50]; Fed. Acquisition Reg. 15.508 (1 Jan. 1986) [hereinafter FAR].

[3] FAR 3.104-4(j) (1).

[4] FAR 3.104-4(k) (1).

[5] AR 600-50 para. 2-1(g).

[6] Maremont Corporation, Comp. Gen. Dec. B-186276 (Aug. 20, 1976), 76-2 CPD ¶ 181.

[7] FAR 35.004; FAR 7.101; FAR 7.102.

[8] FAR 15.504(a).

[9] FAR 15.504(a) (1) and (2); FAR 14.211(b).

submission of unsolicited proposals.[10] The net result of these limited discussions is increased competition, lower prices, and higher quality. In short, the government receives greater value for each dollar spent.

What Information Must Be Protected?

While we are allowed to disclose general information about agency mission and needs, we cannot disclose specific information relating to a proposed contract that would give a contractor an unfair competitive advantage.[11] Such information must be made available to all potential competitors at the same time, using such devices as presolicitation conferences, notices in the *Commerce Business Daily*, draft requests for proposals, and solicitations for planning purposes.[12]

When does a competitive advantage become unfair? The regulations provide little guidance on that key question, mainly because so much depends upon the unique facts of each case. The GAO, however, has issued numerous helpful decisions that provide insight into the most common issues confronting government personnel.

Unfair Competitive Advantage

In competitive acquisitions, offerors have varying strengths and weaknesses inherent within their respective organizations that, depending upon the nature of the proposed contract, translate into competitive advantages and disadvantages. GAO has historically recognized that the government has neither the duty nor the ability to neutralize competitive advantages that typically exist within the marketplace.[13]

Nevertheless, GAO has sustained protests against the government that were based on unfair competitive advantages. An analysis of these cases reveals a common thread. GAO is likely to find that a particular competitive advantage is unfair when there is evidence of favoritism or some other improper activity by the government on behalf of an offeror.[14] It is important to note, however, that protestors have a heavy burden of proving such favoritism because GAO will not attribute "unfair or prejudicial motives" to government officials on the basis of mere "inference or supposition."[15]

The bulk of these cases involves presolicitation discussions, contractor incumbency, or former government employees. Each is discussed below.

Presolicitation Discussions

GAO clearly favors preprocurement discussions with industry so that the government can increase competition by generating interest in its programs and by gathering sufficient information to enable it to more intelligently express its minimum needs.[16]

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[10] FAR 15.504(a)(6). Additionally, while it is permissible to obtain information concerning wage rates, material costs, and similar information from industry for the preparation of government cost estimates, these estimates may not be disclosed to potential contractors. FAR 5.401 (a). Long range unclassified requirements estimates may be disclosed to industry provided prior approval is obtained and notice of the disclosure is made in the *Commerce Business Daily*. FAR 5.404 and DFARS 205.404-2. The Army encourages the disclosure of such advance procurement information to industry through a formal system of appointed Army/Industry Material Information Liaison Officers. *See* AFARS 5.391. This information may not be released in a manner that creates an unfair competitive advantage for any one or group of firms. AFARS 5.391 (f). The Planning, Programming, and Budgeting System (PPBS) generates a substantial amount of financial documentation during the annual budget formulation process. Release of this information is controlled by the DOD Comptroller in accordance with DOD Directive 7045.14 and DOD Instruction 7045.7.

[11] FAR 5.401(b) (1). This provision prohibits disclosure of information that would provide an "undue or discriminatory advantage to private or personal interests"; FAR 14.211(a); AFARS 5.391(f).

[12] AR 600-50, para. 2-1g; FAR 5.404-1(b) (2); FAR 15.402(b); FAR 15.409(c); FAR 15.404; FAR 15.405; FAR 5.204. While these provisions refer to "identical" information to offerors, GAO recognizes the practical impossibility of achieving actual equality in all situations and holds that offerors are entitled to equal access to that information that is "necessary" for submitting intelligent proposals. National American Indian Housing Council, Comp. Gen. Dec. B-218298 (May 23, 1985), 85-1 CPD ¶ 595.

[13] Aerospace Engineering Services Corporation, Comp. Gen. Dec. B-184850 (Mar. 9, 1976), 76-1 CPD ¶ 164.

[14] Telos Computing, Inc., Comp. Gen. Dec. B-190105 (Mar. 27, 1978), 57 Comp. Gen. 370, 78-1 CPD ¶ 235; Coastal Environments, Inc., Comp. Gen. Dec. B-233571 (Mar. 3, 1989), 89-1 CPD ¶ 234; Validity Corporation, Comp. Gen. Dec. B-233832 (Apr. 19, 1989), 89-1 CPD ¶ 389.

[15] Kelsey-Seybold Clinic, PA., Comp. Gen. B-217246 (July 26, 1985), 85-2 CPD ¶ 90, Dayton T. Brown, Inc., Comp. Gen. Dec. B-231579 (Oct. 4, 1988), 88-2 CPD ¶ 314; Power Line Models, Inc., Comp. Gen. Dec. B-220381 (Feb. 28, 1986), 86-1 CPD ¶ 208.

[16] In a landmark 1976 decision, GAO stated,

> Another legitimate preprocurement agency action is discussing requirements with potential suppliers.... Such discussions are clearly necessary for an agency in the conduct of ordinary business. For example, an agency should be able to survey the market to ascertain what is available or encourage the development of sources to compete with present sole sources. Also, such preprocurement discussions may be appropriate where it appears that a particular firm may be the sole supplier of the item meeting the Government's requirements or where there may be certain special conditions affecting a particular firm, e.g., if the firm is foreign.... It would be unwise and unrealistic to limit discussions prior to ascertaining what the Government requires. Indeed, discussions with potential suppliers and testing products are often necessary for an agency to rationally determine just what its minimum needs are. An agency cannot intelligently define its needs in a vacuum. In a number of cases, we have criticized the actions of agencies which improperly limited competition because no discussions of requirements were held with potential suppliers, but rather the only firms solicited made products with which agency personnel were familiar.

Maremont Corporation, Comp. Gen. Dec. B-186276 (Aug. 20, 1976), 76-2 CPD ¶ 181.

Examples of Fair Competitive Advantage From Presolicitation Discussions

GAO has held that none of the following preprocurement activities created an unfair competitive advantage: a presolicitation tour of a government site for one potential offeror (all offerors could have had the same tour had they asked);[17] three government meetings over a six-month period with one potential offeror to discuss his qualifications and interest in the project (all offerors could have had similar discussions had they asked);[18] an advance release of specifications involving a non-complex item to one potential offeror (all offerors eventually got the same information in time to propose intelligently);[19] an in-depth presentation to the government by a potential offeror pursuant to a draft solicitation (such activity is information gathering);[20] a preprocurement shoot-off between two potential offerors to determine the government's minimum needs;[21] and preprocurement testing of a contractor's night vision goggles to determine the government's minimum needs.[22]

Examples of Unfair Competitive Advantage From Presolicitation Discussions

Notwithstanding its preference for early dialogue between government and industry, the GAO has sustained protests where government action results from favoritism or impropriety. For example, GAO found that the government's premature release of an RFP to only one offeror was unfair because it contained the actual evaluation weights not released in the final RFP. Of particular significance to GAO was the fact that the final RFP incorporated all of the handwritten comments of the offeror that received the draft. That fact led GAO to the conclusion that this offeror had direct access to government personnel involved in the formulation of the official RFP, which compromised "the objectivity and impartiality of the process."[23]

GAO has also been critical of presolicitation meetings that take place in unofficial settings and give the appearance of favoritism. In one case, GAO criticized a government representative's lack of good judgment in discussing a pending procurement action with a potential offeror in a restaurant during a "late evening snack." Interestingly, however, GAO concluded that this one "indiscretion" did not require exclusion of the offeror because there was no other evidence of preferential treatment.[24]

GAO clearly will sustain protests when there is evidence of *willful* disclosure of sensitive information to a competitor by government representatives, even when that information is of questionable value. GAO sustained a protest when a high ranking Air Force official allegedly released sensitive information to a consultant, who in turn disclosed it to one of the competing offerors.[25] GAO noted that the integrity of the competitive process would not be served by allowing the award to stand, even if the information did not benefit the wrongdoer.

GAO is likely to require the government to equalize the advantage gained by *inadvertent* disclosure of sensitive information. For example, GAO required the government to reveal all proposed prices when one offeror's price was inadvertently revealed to a competitor by the agency.[26] GAO has ruled, however, that inadvertent disclosure of information from *different* solicitations need not be equalized, even though the result might be unfair.[27] GAO's reasoning is that there is no appropriate

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[17] *See* Kelsey-Seybold Clinic, PA., Comp. Gen. B-217246 (July 26, 1985), 85-2 CPD ¶ 90.

[18] *See* Power Line Models, Inc., Comp. Gen. Dec. B-220381 (Feb. 28, 1986), 86-1 CPD ¶ 208.

[19] Techniarts Engineering, Comp. Gen. Dec. B-235994 (Sept. 28, 1989), 89-2 CPD ¶ 293; Professional Pension Termination Associates, Comp. Gen. Dec. B-230007.2 (May 25, 1988), 88-1 CPD ¶ 498.

[20] Brightstar Communications Ltd., Comp. Gen. Dec. B-218021.2 (Sept. 16, 1985), 85-2 CPD ¶ 290.

[21] Maremont Corporation, Comp. Gen. Dec. B-186276 (Aug. 20, 1976), 76-2 CPD ¶ 181.

[22] ITT Electro-Optical Products Division, Comp. Gen. Dec. B-211403 (Sept. 2, 1983), 83-2 CPD ¶ 299. In another interesting decision, GAO ruled that information released at a post award debriefing to one offeror concerning his own proposal did not provide him with an unfair advantage when negotiations were later reopened due to unrelated defects in the procurement action. GAO reasoned that the government's release of information was proper at the time it was made, and there was no requirement to provide similar information to the other competitors. Federal Auction Service Corporation; Larry Latham Auctioneers, Inc.; Kaufman Lasman Associates, Inc., Comp. Gen. Dec. B-229917.4, B-229917.5, B-229917.7 (June 10, 1988), 88-1 CPD ¶ 5,53.

[23] Willamette-Western Corporation; Pacific Towboat and Salvage Co., Comp. Gen. Dec. B-179328 (Nov. 14, 1974), 74-2 CPD ¶ 259.

[24] Lasar Power Technologies, Inc., Comp. Gen. Dec. B-233369, B-233369.2 (Mar. 13, 1989), 89-1 CPD ¶ 267.

[25] Litton Systems, Inc., Comp. Gen. Dec. B-234060 (May 12, 1989), 89-1 CPD ¶ 450.

[26] 56 Comp. Gen. 505 (1977).

[27] Youth Development Associates, Comp. Gen. Dec. B-216801 (Feb. 1, 1985), 85-1 CPD ¶ 126.

means for eradicating such advantages where different groups of competitors are involved in both solicitations.

Contractor Incumbency

The basic rule is that the government has no obligation to equalize competitive advantages of incumbent contractors derived from the experience, resources, or skills obtained in performing a government contract or because of the offeror's particular circumstances.[28]

Examples of Fair Competitive Advantages Relating to Incumbency

GAO has ruled that it is not unfair when the incumbent contractor obtains any of the following: "background information" on the proposed contract during contract performance;[29] information that is helpful but not essential for the submission of an intelligent offer;[30] significant information, equipment, and facilities relating to the future system;[31] equipment purchased with its own capital;[32] valuable experience on the project;[33] and knowledge of its own workforce.[34]

Examples of Unfair Competitive Advantages Relating to Incumbency

Unfair competitive advantages concerning contractor incumbency typically arise when the government improperly enhances the incumbent's advantage by issuing vague or erroneous guidance in a solicitation, thereby ensuring that only the incumbent can intelligently compete.

GAO sustained a protest when it found that the incumbent contractor was the only offeror who had enough background information to compete because the government's solicitation failed to accurately describe the number and content of the required units of work.[35] GAO pointed out that the RFP provided insufficient detail, allowed only thirty days' bidding time, and resulted in receipt of only one offer. That offer came from the incumbent who had actual knowledge of the true requirement. Similarly, GAO sustained another protest where only the incumbent contractor knew that the actual requirement involved only 1,500 files instead of the 20,000 files described in the government's solicitation.[36]

In one curious but noteworthy decision, however, GAO held that the incumbent did not receive an unfair competitive advantage, even though only he knew that some of the RFP's stated requirements were not actually needed and even though his proposed price was only $7,300 less than the protester's price on a 1.5 million dollar effort.[37] GAO reasoned that the incumbent had not billed the government for the same deleted item on its earlier contract, and it appeared that the price impact on the protester's proposal would not have been significant if the protester had known of the deletion.

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[28] Aerospace Engineering Services Corporation, Comp. Gen. Dec. B-184850 (Mar. 9, 1976), 76-1 CPD ¶ 164. Likewise, the government need not compensate for the *disadvantages* of incumbency either. *See* John Morris Equipment and Supply Company, Comp. Gen. Dec. B-218592 (Aug. 5, 1985), 85-2 CPD ¶ 128.

[29] ETEK, Inc., Comp. Gen. Dec. B-234709 (July 11, 1989), 89-2 CPD ¶ 29.

[30] McCotter Motors, Inc., Comp. Gen. Dec. B-209986 (Aug. 2, 1983), 83-2 CPD ¶ 156.

[31] S.T. Research Corp., Comp. Gen. Dec. B-233309 (Mar. 2, 1989), 89-1 CPD ¶ 223.

[32] B. B. Saxon Company, Inc., Comp. Gen. Dec. B-190505 (June 1, 1978), 57 Comp. Gen. 501, 78-1 CPD ¶ 410; *see also* Telos Computing, Inc., Comp. Gen. Dec. B-190105 (Mar. 27, 1978), 57 Comp. Gen. 370, 78-1 CPD ¶ 235, for a list of other examples where unfair competitive advantages have been alleged but not shown.

[33] Integrity Management International, Inc., Comp. Gen. Dec. B-213574 (Apr. 19, 1984), 84-1 CPD ¶ 449.

[34] Master Security, Inc., Comp. Gen. Dec. B-232263 (Nov. 7, 1988), 88-2 CPD ¶ 449. In one interesting decision, GAO concluded that even though the incumbent received government technical assistance in developing cable testers on a contract to produce cable adapters, that assistance did not give an unfair competitive advantage in a later procurement for cable testers. GAO based this decision on the fact that the government assistance was needed to assure satisfactory completion of the adapter contract. Consolidated Industries, Inc., Comp. Gen. Dec. B-210183 (Aug. 25, 1983), 83-2 CPD ¶ 249. Also, GAO has held that the government need not equalize competitive advantages that resulted when the incumbent helped another contractor to compete since such action did not result from improper government action. Alamo Technology, Inc., National Technologies Associates, Inc., Comp. Gen. Dec. B-221336, B-221336.2 (Apr. 7, 1986), 86-1 CPD ¶ 340; *see also* Base Maintenance Services Co., Comp. Gen. Dec. B-213752 (Dec. 27, 1983), 84-1 CPD ¶ 30. Marketing consultants will soon be required to certify that they have not given their employing contractors an unfair competitive advantage. *See* section 8141 of the 1989 DOD Appropriation Act and 54 Fed. Reg. 2443 and 51805.

[35] University Research Corp., Comp. Gen. Dec. B-216461 (Feb. 19, 1985), 85-1 CPD ¶ 210.

[36] Informatics, Inc., Comp. Gen. Dec. B-187435 (Mar. 15, 1977), 77-1 CPD ¶ 190 and (June 2, 1977), 77-1 CPD ¶ 383 (reconsideration).

[37] Telos Computing, Inc., Comp. Gen. Dec. B-190105 (Mar. 27, 1978), 57 Comp. Gen. 370, 78-1 CPD ¶ 235. GAO will also closely scrutinize incumbent contractors who were in a position to influence for their own benefit the development of specifications. *See* ETEK, Inc., Comp. Gen. Dec. B-234709 (July 11, 1989), 89-2 CPD ¶ 29; Associated Chemical and Environmental Services, U.S. Pollution Control, Inc., and Chemical Waste Management, Inc., Comp. Gen. Dec. B-228411.3, B-228411.4, 8-228411.5 (Mar. 10, 1988), 88-1 CPD ¶ 284.

Former Government Employees

The basic rule is that the mere hiring of a former government official who is familiar with the type of work required but is not privy to the contents of proposals or to other inside agency information does not confer an unfair competitive advantage that the government must neutralize.[38] Nevertheless, GAO will sustain a protest if the protester can show that the former employee possessed and improperly used inside information or that the employee otherwise improperly influenced the procurement on behalf of the awardee.

Over the years, GAO has consistently ruled that protesters must prove unfair advantage from the hiring of a former government official with "hard facts" and not mere speculation, inference, or innuendo.[39] Conversely, GAO will allow the government to exclude an offeror from the competition with a somewhat lesser showing of "hard facts" because the government's policy is "intended to avoid even the appearance much less the fact, of favoritism or preferential treatment."[40] GAO is clearly reluctant to substitute its judgment for that of the procuring agency when the government's decision to exclude an offeror is reasonable.[41]

Examples of Fair Competitive Advantage Involving Former Government Employees

The GAO has ruled that an offeror does not receive an unfair competitive advantage by hiring a former government employee,[42] even where that individual had written a paper as a government employee that was used by others to prepare the statement of work.[43] GAO also found that it was not unfair for a retired military officer to serve as a subcontractor's vice president and to help prepare the offeror's proposal, even though the officer admitted that he was a close friend and former supervisor of a key government official involved with the source selection.[44] Of critical significance was the fact that the former employee was not involved with the procurement as a government official.

In a close case, GAO did not find unfairness when an offeror hired the former chief of the government's procuring section, even though the former employee assisted in the preparation of the offeror's technical proposal.[45] A key fact was that the former employee denied having reviewed the RFP as a government employee.

Examples of Unfair Competitive Advantage Involving Former Government Employees

In a recent significant case, GAO found that an offeror received an unfair competitive advantage by hiring a retired military officer who admitted to having seen the draft source selection plan as a government employee and to having helped prepare the offeror's proposal.[46] The retired officer denied that he consciously used inside information to prepare the proposal. GAO found that as a practical matter it was "unlikely" that the officer "could have avoided using the restricted information." Despite the "absence of specific evidence of bad faith," GAO decided to sustain the protest. This case signals that GAO is willing to find unfairness in cases involving former employees despite the presence of good faith.

In another case, GAO upheld the government's exclusion of an offeror from the competition for its hiring of the former deputy director of the requiring activity.[47] While the contractor denied using the employee in the preparation of its proposal, GAO found that the former

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[38] *See* Dayton T. Brown, Inc., Comp. Gen. Dec. B-231579 (Oct. 4, 1988), 88-2 CPD ¶ 314.

[39] Chemonics International, Comp. Gen. Dec. B-222793 (Aug. 6, 1986), 86-2 CPD ¶ 161; HLJ Management Group, Inc., Comp. Gen. Dec. B-225843.3 (Oct. 20, 1988), 88-2 CPD ¶ 375; Louisiana Foundation for Medical Care, Comp. Gen. Dec. B-225576 (Apr. 29, 1987), 87-1 CPD ¶ 451 (in the Louisiana Foundation case, sales "puffery" was not enough). Imperial Schrade Corp., Comp. Gen. Dec. B-223527.2 (Mar. 6, 1987), 87-1 CPD ¶ 254 (nor is a "hint of foul play" sufficient). Walker's Freight Line, Comp. Gen. Dec. B-226216.2 (Jan. 15, 1986), 86-1 CPD ¶ 45; Holsman Services Corp., Comp. Gen. Dec. B-230248 (May 20, 1988), 88-1 CPD ¶ 484; *see also* CACI, Inc.-Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983).

[40] Defense Forecasts, Inc., Comp. Gen. Dec. B-219666 (Dec. 5, 1985), 85-2 CPD ¶ 629; International Resources Group, Ltd., Comp. Gen. Dec. B-234629.2 (Aug. 31, 1989), 89-2 CPD ¶ 196; *see also* NKF Engineering, Inc., Comp. Gen. Dec. B-220007 (Dec. 9, 1985), 85-2 CPD ¶ 638, wherein GAO stated: "Our role is to determine whether there was a reasonable basis for the agency's judgment that the likelihood of an actual conflict of interest or impropriety warranted excluding an offer."

[41] Bendix Field Engineering Corp., Comp. Gen. Dec. B-232501 (Dec. 30, 1988), 88-2 CPD ¶ 642.

[42] Dayton T. Brown, Inc., Comp. Gen. Dec. B-231579 (Oct. 4, 1988), 88-2 CPD ¶ 314; Regional Environmental Consultants, Comp. Gen. Dec. B-223555 (Oct. 27, 1986), 86-2 CPD ¶ 476.

[43] Chemonics International, Comp. Gen. Dec. B-222793 (Aug. 6, 1986), 86-2 CPD ¶ 161; *see also* Regional Environmental Consultants, Comp. Gen. Dec. B-223555 (Oct. 27, 1986), 86-2 CPD ¶ 476.

[44] *See* Lasar Power Technologies, Inc., Comp. Gen. Dec. B-233369, B-233369.2 (Mar. 13, 1989), 89-1 CPD ¶ 267.

[45] Culp/Wesner/Culp, Comp. Gen. Dec. B-212318 (Dec. 23, 1983), 84-1 CPD ¶ 17.

[46] Holmes Narber, Comp. Gen. Dec. B-235906, B-235906.2, (Oct. 26, 1989), 89-2 CPD ¶ 379.

[47] *See* NKF Engineering, Inc., Comp. Gen. Dec. B-220007 (Dec. 9, 1985), 85-2 CPD ¶ 638, and NKF Engineering, Inc. v. United States, 805 F.2d 372 (Fed. Cir. 1986). GAO has also upheld the government's exclusion of an offeror for the hiring of a *current* government employee to avoid the appearance of a conflict of interest. *See* Defense Forecasts, Inc., Comp. Gen. Dec. B-219666 (Dec. 5, 1985), 85-2 CPD ¶ 629. *But see* Chemonics International Consulting Division, Comp. Gen. Dec. B-210426 (Oct. 7, 1983), 83-2 CPD ¶ 426.

employee had inside knowledge of the procurement and of the competing proposals. GAO criticized the contractor's failure to address in his proposal the "clear appearance" of an unfair competitive advantage arising from its hiring of an employee with inside knowledge of the on-going competition.

Conclusion

It is essential that the lines of communication between the government and industry remain open in a way that does not undermine the integrity of the contracting process. Government representatives may explore the marketplace, identify potential sources of supply, and conduct limited discussions with them. During those discussions they can disclose *general* information about agency mission and needs. They can even identify areas of interest for the submission of unsolicited proposals.

Government representatives cannot disclose specific information relating to a proposed contract that would give a contractor an unfair competitive advantage. If they need to release such information, they must give all competitors an equal opportunity to receive it, using such techniques as presolicitation conferences, *Commerce Business Daily* announcements, draft RFPs, and solicitations for planning purposes.

Not all competitive advantages are unfair. The government has neither the duty nor the ability to neutralize competitive advantages that typically exist in the marketplace. The government *does* have the duty to refrain from creating or enhancing a competitive advantage by engaging in favoritism or in some other improper activity on behalf of a contractor.

Sixth Amendment Issues at the Article 32 Investigation

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Introduction

In certain types of cases, the article 32 investigation is the most critical and determinative stage of the trial process. These cases, typically the most difficult to prosecute or defend, involve the "one-on-one" situation where the accused proclaims his innocence and the rape victim or the child victim testifies at the article 32 investigation but is "unavailable" to testify at the court-martial. The article 32 testimony is then admitted at the court-martial, and the military judge and court members never have an opportunity to hear the witness actually testify.

This article will discuss the significance of the article 32 investigation from a sixth amendment perspective. It will examine the difficulties that exist for defense counsel, the tough decisions faced by trial counsel and military judges, and the potential future issues for appellate courts.

Hypothetical

Consider this hypothetical case: *United States v. Sergeant Joe Doe*. SGT Doe is charged with rape of his five-year-old daughter, Sue. Defense counsel received a copy of the charge sheet and supporting documents on 5 July. Defense counsel interviewed Sue twice. Each time, however, a judge advocate assigned to the Administrative Law Division was present. Sue's social worker had insisted that someone from the staff judge advocate's office be present to ensure that Sue would not be harassed and traumatized.

The article 32 investigation was held on 15 July. When Sue testified at the article 32 investigation, she had her back to SGT Doe and was facing the article 32 investigating officer. This arrangement was also based on the recommendation of the social worker, who was convinced that Sue would suffer emotional distress if she were forced to face SGT Doe. Prior to questioning Sue, the defense counsel stated that she was asking questions only for discovery purposes, not for impeachment.[1] In addition, defense counsel objected to the presence of the administrative law attorney at her interviews with Sue and to the fact that Sue was testifying with her back to Doe.

At the article 32 investigation, Sue responded to twenty-five questions asked by defense counsel. Often her responses to questions were "yes," "no," "dunno," or "um huh." Sue's responses were difficult to hear and understand on the tape recording of the article 32. Sue and her mother left the United States immediately after the article 32 investigation, and Sue is not available to testify at the court-martial. The government intends to rely on Sue's testimony from the article 32 investigation to prove its case. SGT Doe is pleading not guilty.

[1] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 804(b)(1) [hereinafter Mil. R. Evid. 804(b)(1)]:

> *Former testimony.* Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record. This paragraph is subject to the limitations set forth in Articles 49 and 50.

The Opportunity for Cross-Examination

Although the defense counsel stated that she was asking questions only for discovery purposes, the Court of Military Appeals has emphatically rejected attempts to limit the use of article 32 investigation testimony by claiming to cross-examine only for discovery purposes and not for impeachment. In *United States v. Connor* the court found the distinction between discovery and impeachment to be "unworkable in practice."[2] If a defense counsel had the opportunity to cross-examine a witness at the article 32 investigation, then the counsel's motive when questioning the witness is presumed to be for discovery *and* impeachment purposes.

> Even if a defense counsel states at the beginning of an Article 32 hearing that he only wishes to obtain discovery of government evidence, he may later cross-examine about matters which tend to impeach the witness. Indeed, in conducting pretrial discovery, a lawyer often seeks to "discover" evidence which may be useful later for "impeachment."[3]

In *Connor* a "primary" defense counsel conducted all cross-examination at the article 32 investigation. The other two counsel remained silent, although they had the *opportunity* to ask questions.

Defense counsel in *Connor* alleged that some evidence presented at trial was not available at the article 32 investigation. As a result, they claimed they were unable to question the witness about this new evidence. The court dismissed this complaint: "Moreover, we are convinced that here, as in most cases, the former testimony will be admissible even if, after the pretrial hearing, the defense has acquired additional information that might have been used in questioning the witness."[4] The court noted one exception: a specific request for available evidence by defense counsel that was ignored by the government. This holding was reaffirmed in *United States v. Hubbard*,[5] when an autopsy report was available only after the article 32 investigation and after the sole and critical witness had disappeared.

The Court of Military Appeals has held that testimony from an article 32 investigation is presumed to be reliable. As such, it may be admitted at the court-martial if the defense had an opportunity to cross-examine the witness and if the testimony is presented in a form that is "substantially verbatim."[6] In our hypothetical case of *United States v. Doe*, if the court decides that defense had the opportunity to cross-examine Sue and had received all material evidence available at the time of the article 32 investigation, then Sue's testimony would be admissible at the court-martial. An opportunity to cross-examine is usually defined as unrestricted cross-examination; it is irrelevant that the witness's memory is poor or that the cross-examiner does not have all of the information that he or she might want.[7]

Article 46 and Interviews

In *Doe* defense counsel's first objection was that she was not allowed to interview Sue outside the presence of a third party. In *United States v. Irwin*[8] the Court of Military Appeals held that Irwin's article 46, UCMJ, rights were violated when defense counsel was not allowed to interview a child victim/witness without an observer.[9] The court found that there was an insufficient basis for the convening authority's decision to grant the request for an observer[10] and that his decision should not have been made *ex parte*. Nevertheless, the court found that the error was harmless because the order was lifted

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[2] 27 M.J. 378 (C.M.A. 1989).

[3] *Id.* at 388.

[4] *Id.* at 390.

[5] 28 M.J. 27 (C.M.A. 1989).

[6] Mil. R. Evid. 804(b)(1) requires a verbatim record of former testimony. The court in *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988), however, held that a "substantially verbatim" article 32 transcript was admissible. The quality of the tapes in *Doe* raises the question as to whether *Arruza* or Mil. R. Evid. 804(b)(1) were satisfied.

[7] *See* Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (defense not allowed to see the state social worker records on the alleged child victim); Delaware v. Fensterer, 474 U.S. 15 (1985) (government witness remembered his conclusion but not the basis for it); United States v. Owens, 484 U.S. 554 (1988) (the victim could not remember who attacked him, but he could remember what he told the police).

[8] 30 M.J. 87 (C.M.A. 1990).

[9] Uniform Code of Military Justice art. 46, 10 U.S.C. § 846 (1982):

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

Article 46 protects many of the same rights as the sixth amendment, including the following: the right to prepare and present a defense; compulsory process for obtaining witnesses in the defense's favor; and, tangentially, confrontation of adverse witnesses.

[10] The convening authority primarily relied on the recommendation of the Naval Investigative Service (NIS) agent, and the agent's "unjustified indictment of the defense bar." *Irwin*, 30 M.J. at 93.

before the court-martial and the defense counsel had the opportunity for an unobserved interview. Furthermore, the military judge offered a continuance to the defense counsel during the court-martial, and it was purely speculative as to whether the defense counsel's rapport with the child at trial was affected.[11]

Irwin can certainly be distinguished from *Doe*. Doe's defense counsel did not have an opportunity to interview Sue without an observer. Additionally, a continuance would not have helped because Sue was unavailable at trial. Doe can argue that this was a violation of his article 46, UCMJ, and sixth amendment rights. The presence of an observer probably affected defense counsel's ability to adequately investigate the case, prepare for cross-examination, and establish the necessary rapport with Sue.

Confrontation

Sergeant Doe's defense counsel also objected to Sue testifying at the article 32 investigation with her back to Sergeant Doe. This lack of face-to-face confrontation could be the most difficult and most debated issue for courts in the near future, especially in cases of child victims.

Defense's objection is partially based on *Coy v. Iowa*.[12] In *Coy* Justice Scalia, writing for the majority of the Supreme Court, found a sixth amendment confrontation violation when the child victims were allowed to testify at trial from behind a screen that prevented them from seeing Coy. "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[13] Justice Scalia did not address the question of whether there are any exceptions to the requirement for face-to-face confrontation.

Justice O'Connor, in her concurring opinion in which she was joined by Justice White, recognized some exceptions to the requirement for face-to-face confrontation. According to Justice O'Connor, such exceptions are necessary to further important public policies, and "[t]he protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong."[14]

In *Maryland v. Craig*[15] Justice O'Connor, joined by Justices White, Blackmun, Kennedy, and Chief Justice Rehnquist, again addressed the exception issue. In *Craig* the children testified by one-way closed circuit television outside of the courtroom, with a defense counsel, a prosecutor, and technicians present. The accused, jury, judge, another defense counsel, and prosecutor were in the courtroom and could see the children as they testified. The children could not see anyone in the courtroom. Child abuse counselors and social workers had testified that the children would suffer serious emotional distress and would not be able to communicate if they had to testify in the room with the accused. This satisfied the trial judge, who applied the Maryland statute that allowed for such an out-of-court arrangement if the children would suffer serious emotional distress that would prevent them from communicating.

The Supreme Court in *Craig* held that face-to-face confrontation was preferred when a child witness was available to testify. Nevertheless, the Court held that such confrontation was not required if the state made a case-specific showing that the child would suffer emotional trauma, impairing his or her ability to communicate, if forced to testify in the room with the accused. After the trial court makes that initial finding, then the accused's confrontation rights are protected by "rigorous adversarial testing" where the witness is subject to cross-examination under oath so that the judge, jury, and the accused can observe his or her demeanor.[16]

The issue for military courts is whether the article 32 investigation is an adversarial proceeding where the accused should have his or her confrontation rights protected as discussed in *Craig*. *United States v. Bramel*,[17] recently decided by the Army Court of Military Review, addressed the status of the article 32 investigation and the accused's confrontation rights at that proceeding.[18] In *Bramel* the child testified at the article 32 investigation

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[11] *Id.* at 95.

[12] 487 U.S. 1012 (1988).

[13] *Id.* at 1016. Since the *Coy* decision, many articles have been written about the case and numerous courts have wrestled with the decision. This article will focus on the *Coy* implications at an article 32 investigation and will not be an extensive discussion of *Coy* or its merits.

[14] *Id.* at 1025.

[15] No. 89-478 (June 27, 1990).

[16] Justice Scalia, in his dissenting opinion, said: "Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." *Id.* The dissent followed *Coy* and insisted that face-to-face confrontation is required by the sixth amendment.

[17] 29 M.J. 953 (A.C.M.R. 1990).

[18] The Court of Military Appeals has recently heard arguments in another confrontation case, United States v. Thompson, 29 M.J. 541 (A.F.C.M.R. 1989). In *Thompson* the child victims testified at the "judge alone" court-martial with their backs to the accused. This is a case to watch but will not be discussed in this article because it did not involve testimony at an article 32 investigation. For a more detailed discussion of *Thompson*, see TJAGSA Practice Note, *The Air Force Faces Coy*, The Army Lawyer, Jan. 1990, at 38.

behind a screen. He did not know that the accused, his step-father, was present. This arrangement was ordered by the summary court-martial convening authority. The child's mother said that her son was afraid of men in general and was particularly afraid of Bramel. The child eventually testified at the court-martial facing Bramel, which is a significant factor that distinguishes this case from *Doe*.

In *Bramel* the Army Court of Military Review said: "Nevertheless, even were we to assume that the right of face-to-face confrontation at trial is absolute, the holding of *Coy v. Iowa* is inapplicable to the case at bar."[19] Relying on *Kentucky v. Stincer*,[20] the Army Court of Military Review held that "[o]bviously, the pretrial investigation provided for by Article 32, UCMJ, is neither a trial nor part of the *trial* proceeding."[21] As a result, the accused does not have a right to face-to-face confrontation. The court compared the article 32 investigation to a competency hearing like that held in *Stincer* and noted that the "primary function" of the article 32 investigation is "to obtain an impartial recommendation for disposition of the case and to provide the accused an opportunity for discovery."[22]

The comparison made by the *Bramel* court is questionable. A competency hearing can be distinguished from an article 32 investigation. The competency hearing in *Stincer* was held to resolve three basic issues: 1) whether the children victims were capable of observing and remembering facts; 2) whether the children could relate the facts to the judge and jury; and 3) whether the children felt a moral obligation to tell the truth.[23] Unlike an article 32 investigation, a competency hearing has a very limited purpose and includes inquiries into the child's age, date of birth, what it means to tell the truth, etc. The child does not testify concerning the accused's guilt or innocence, so confrontation is not essential. In *Stincer* the Supreme Court said: "We emphasize, again, the particular nature of the competency hearing. No question regarding the substantive testimony that the two girls would have given during trial was asked at that hearing."[24]

At an article 32 investigation, the facts of the case and the specific allegations are explored. The victim usually testifies about the accused's conduct. The victim is subject to cross-examination regarding such matters. As previously discussed in this article, the Court of Military Appeals in *Connor* rejected the argument that questions at an article 32 investigation are only for discovery. Thus, the Army Court of Military Review in *Bramel* seemed to ignore the Court of Military Appeals in *Connor*.[25] The motive for cross-examination at an article 32 investigation is for impeachment as well as discovery. As a result, it is much broader than the motive for cross-examination at a competency hearing.

The court in *Bramel* also stated that "[a]lthough the Article 32, UCMJ, pretrial investigation is an important pretrial right, it is not a critical stage or crucial step in the trial."[26] This statement appears to contradict the Court of Military Appeals' recognition of the article 32 investigation as a very critical stage of the court-martial, so crucial that, at times, the significant testimony occurs at the article 32 investigation and not at the court-martial. This occurs in cases like *Doe*, when the witness is available only at the article 32 investigation and his or her testimony is admitted into evidence at the court-martial.

In *Hubbard* the Court of Military Appeals, citing *Coy* and referring to testimony by a witness at the article 32 investigation, stated: "The Sixth Amendment demands that an accused be allowed an opportunity for face-to-face confrontation."[27] The court discussed the effects of having the witness face the accused at the article 32 investigation and noted the value of such confrontation.[28] Therefore, the Court of Military Appeals has recognized confrontation rights at the article 32 investigation that are

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[19] *Bramel*, 29 M.J. at 963.

[20] 482 U.S. 730 (1987). The accused was not present at a hearing to determine the child victims' competency, although he was present when the children testified at the trial. The Supreme Court held: "Because respondent had the opportunity for full and effective cross-examination of the two witnesses during trial, and because of the nature of the competency hearing at issue in this case, we conclude that respondent's rights under the Confrontation Clause were not violated by his exclusion from the competency hearing of the two girls." *Id.* at 744.

[21] *Bramel*, 29 M.J. at 964.

[22] *Id.*

[23] *Stincer*, 482 U.S. at 741.

[24] *Id.* at 745-46.

[25] 27 M.J. 378 (C.M.A. 1989).

[26] 29 M.J. 953 (A.C.M.R. 1990).

[27] *Hubbard*, 28 M.J. at 32.

[28] *Id.* at 33 n.4.

consistent with prevailing Supreme Court standards for trials (now *Craig* instead of *Coy* standards).

The *Bramel* court's strongest argument to allow the child victim to testify behind a screen was that article 32(b), UCMJ, provides for cross-examination, not confrontation. The problem arises when the child or other crucial witness is not available to testify at the court-martial and the article 32 testimony is relied upon. *Bramel* was saved because the child was available and faced Bramel at his court-martial. Otherwise, pursuant to *Craig*, the mother's testimony in *Bramel* would probably not have been sufficient to show trauma that required avoidance of face-to-face confrontation. Also, *Craig* encouraged, as part of confrontation, the right of the accused to observe the demeanor of the witness. Bramel could not see the child victim when he testified. In our hypothetical case, the victim cannot testify at the court-martial so the confrontation violations at the article 32 investigation should be analyzed. Was the social worker's statement sufficient evidence of potential trauma if Sue faced Doe? Was Doe afforded unlimited cross-examination? Should other arrangements have been made, like closed circuit television, so that Doe could see Sue testify? These are the issues of the future.

Practice Tips

At an article 32 investigation, the government should always attempt to arrange for face-to-face confrontation between a child victim (crucial witness) and the accused. If that is impossible, the government should follow the requirements of *Craig*—demonstrate trauma and then protect the other branches of confrontation, such as cross-examination, oath, and observance of demeanor. This area of law is too unsettled to risk a confrontation violation, especially when the article 32 investigation is so often the trial substitute. The Supreme Court's dual concerns of protecting the accused's confrontation rights and protecting the child victims make these cases very difficult to predict and very fact-specific.

Defense counsel have some very specific responsibilities in these cases:

—Make confrontation objections at every stage of the trial, particularly when the article 32 testimony may be used in lieu of live testimony at the court-martial.

—Always remember *Connor* and the sixth amendment obligation to cross-examine at the article 32 investigation.

—Object to restrictions on pretrial interviews of children.

—Watch for article 46, UCMJ, violations.

—Watch for future *Craig* cases from the Court of Military Appeals.

Conclusion

The *Coy/Connor/Craig* cases and their progeny will create many interesting issues for counsel and courts. *Connor* emphasized the presumed opportunity and impeachment motive for cross-examination at the article 32 investigation. The opportunity for cross-examination may be limited if defense does not have full access to the witness for an interview or if the government does not disclose all available material evidence to defense. When the victim is unavailable at the court-martial, the article 32 investigation is a crucial proceeding. For confrontation purposes, it may become the equivalent of an adversarial criminal proceeding, therefore requiring the *Craig* analysis of confrontation rights. Like Doe, many accused soldiers in the future may find that the evidence presented at the court-martial pales in comparison to what occurred at the article 32 investigation. These soldiers will require aggressive representation to ensure they receive the full benefit of their sixth amendment rights.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

"Out of Bounds"

Imagine if you will, a small courtroom located on a military post. It is late July, there is no air-conditioning, and the room seems to shrink as the walls of the midsummer heat close in on the occupants. The case being heard is routine: a special court-martial convened to try a one-

time offense of cocaine use. The accused pleads guilty, but has requested a panel of officers to hear the presentencing evidence. The government offers no evidence other than a short stipulation of fact and the accused's DA Forms 2-1 and 2A.[1] The defense presents a character witness, a few miscellaneous documents, and the accused's unsworn statement of how the drug use occurred. The trial to this point has been uneventful, almost hypnotic. The panel members sit patiently, anticipating final argument.

As the proceedings wind down, the trial counsel rises to give her closing argument. The defense counsel listens to the hypnotic voice of the trial counsel while mentally making notes on those points worthy of rebuttal. During the argument, the trial counsel questions the uncontradicted testimony of the accused concerning the circumstances under which the accused used the drug. The trial counsel then speculates about what actually might have happened and contrasts that scenario with the accused's testimony. Suddenly, and with alarm, the defense counsel objects, realizing that the trial counsel is arguing facts not in evidence. The trial counsel has exceeded the bounds of fair comment!

Such are the circumstances found in *United States v. Rutherford*,[2] wherein the Army Court of Military Review held that certain comments by the trial counsel during argument were improper. The court held that the military judge committed plain error when he failed to interrupt the trial counsel and give the necessary cautionary instructions to the court members.

In *Rutherford* the evidence established that although the accused was twenty-six years old, he was shy, quiet, obedient, and subject to being influenced. During his unsworn statement, the accused testified that he asked a civilian whom he had seen on post to give him a ride back to his barracks. According to the accused, the civilian asked him if he used cocaine and he told the civilian that he did not. The civilian then persuaded the accused to try the cocaine.[3] The government did not offer any evidence contradicting the accused's testimony, nor was there any evidence suggesting that the accused had used drugs on any other occasion.[4]

During argument, the trial counsel remarked to the court that the accused's "... story is just not credible. He's made up this story to avoid the truth, which the Government would submit is probably more like this — that he went out and bought cocaine."[5] At this point, the defense counsel objected, but the objection was overruled by the military judge. The trial counsel continued by saying "the government would argue that the scenario probably went something like this —he went out and bought cocaine and that it wasn't the first time he had used it, but instead he makes up this story today about someone offering him cocaine for free ... ."[6]

It is well established that counsel must limit argument to evidence on the record and to such fair inferences as may be drawn therefrom.[7] In addition, counsel may not express or convey a personal belief or opinion as to the truth or falsity of any testimony or evidence.[8] When the trial counsel in *Rutherford* discoursed on what she personally thought were the facts of the case, she was not drawing upon legitimate inferences from evidence of record or appealing to the common experiences of the members of the court-martial. Instead, the trial counsel was inviting the members to accept new information as factual, even though it was based solely on speculation.

The Army court in *Rutherford* held that while it would be "proper for the trial counsel to argue that the accused's story was not credible, it was improper for her to argue that the [accused] had used cocaine on other occasions not charged."[9] The court further held that the "... trial judge has the affirmative duty to interrupt an improper argument and give the necessary cautionary instructions to the court members.... His failure to do so ... was plain error."[10] The court concluded by stating that such a failure on the part of the military judge "to instruct the court members to disregard the suggestions by the trial counsel, ... raised a fair risk of prejudice as to the sentence."[11]

It is clear from the *Rutherford* decision that it is improper and objectionable for trial counsel to fabricate

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[1] Dep't of Army, Form 2A, Personnel Qualification Record — Part 1 (1 May 1985); Dep't of Army, Form 2-1, Personnel Qualification Record — Part II (1 Jan. 1973).

[2] 29 M.J. 1030 (A.C.M.R. 1990).

[3] *Rutherford*, 29 M.J. at 1031.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See* United States v. Nelson, 1 M.J. 235 (C.M.A. 1975).

[8] *See* Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 919 discussion; *see also* United States v. Horn, 9 M.J. 429 (C.M.A. 1980); United States v. Knickerbocker, 2 M.J. 128 (C.M.A. 1977).

[9] *Rutherford*, 29 M.J. at 1031.

[10] *Id.*

[11] *Id.*

their own version of their facts surrounding a charged offense. Comments by trial counsel suggesting that the accused engaged in uncharged misconduct on other occasions are also improper and objectionable. If such comments are made, it is plain error if the military judge fails to instruct the court members to disregard the comments of the trial counsel.

Rutherford stands for the proposition that defense counsel must be vigilant to inappropriate behavior and overreaching by trial counsel. Final argument presents a forum in which counsel are allowed one last opportunity to persuade the finder of fact that their position is the more reasonable and believable one. Final argument also presents an opportunity for counsel to improperly attempt to stretch the boundaries of allowable commentary and infuse personal opinion or unproven facts.

Defense counsel must remain alert throughout a trial, including final argument. Make trial counsel limit arguments to those facts admitted into evidence and to reasonable inferences therefrom. When trial counsel step beyond the boundaries of fair comment, defense counsel should object. In cases being heard before panels, defense counsel should request curative instructions. Such objections will preserve the issue for appeal. Captain Michael J. Coughlin.

Continuing Jurisdiction—*United States v. Poole*

The Court of Military Appeals recently clarified its position on the issue of jurisdiction over service members whose terms of enlistment have expired but who have not received appropriate discharge certificates. In *United States v. Poole*,[12] the court held that jurisdiction to court-martial a service member exists until the service member's military status is terminated by formal discharge, despite delay by the government in discharging that person at the end of an enlistment.[13] Additionally, the court held that unreasonable delay in accomplishing discharge or release from active duty might give the service member a defense to some military offenses, but did not defeat jurisdiction.[14]

In *Poole* the accused had enlisted in the Navy for a four-year term. Because of extended periods of unauthorized absence and a resulting court-martial conviction, the accused's enlistment was extended to 15 April 1983. On that date, the accused asked the legal officer of the ship on which he was assigned whether he would be discharged. He was not, however, soon discharged, and on 11 May 1983, he left without authority and remained absent for a year. The accused's ship had been preparing for an eight-month deployment, and the accused had told his supervisors "I did my time."[15] After a brief return to military control, the accused again absented himself from 17 May 1984, until 14 April 1987. At the court-martial for this absence, the accused claimed that because the Navy failed to discharge him in 1983 within a reasonable time after his enlistment expired, he was no longer subject to court-martial jurisdiction.[16] The Court of Military Appeals disagreed.

In evaluating the facts in *Poole*, the court found that military jurisdiction continues until a service member's military status is terminated by discharge. The court held that no exception exists for the situation in which an unreasonable delay occurs before the formal discharge is accomplished. Therefore, the government's delay, even an unreasonable delay, in discharging a person at the end of an enlistment will not result in a "constructive discharge."[17]

Trial defense counsel should be aware that a service member unreasonably denied discharge paperwork is not without some form of remedy. The Court of Military Appeals in *Poole* suggested several avenues of relief, to include submission of a complaint under article 138;[18] application to the Board for Correction of Military Records;[19] or relief in the form of an extraordinary writ.[20] Additionally, the court pointed out that unreasonable delay in accomplishing discharge from active duty might give a service member a defense to some military offenses.[21] For example, the court stated that if the judge had accepted the accused's testimony that he had made repeated efforts to obtain his discharge, the accused

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[12] 30 M.J. 149 (C.M.A. 1990).

[13] *Poole*, 30 M.J. at 151. *But see* United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983). In *Poole* the Court of Military Appeals specifically rejected any "prior intimation to the contrary [of the holding in *Poole*]" that *Fitzpatrick* may have created. *Id.*

[14] *Id.*

[15] *Id.* at 150.

[16] *Id.*

[17] *Id.* at 151.

[18] Uniform Code of Military Justice art. 138, 10 U.S.C. § 938 (1982).

[19] *See generally* Army Reg. 15-85, Boards, Commissions, and Committees: Army Board for Correction of Military Records (18 May 1977).

[20] *See* Parisi v. Davidson, 405 U.S. 34, 39 (1972): "The writ of habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces."

[21] Military offenses as distinct from civil-type offenses. *See* United States v. Marsh, 15 M.J. 252 (C.M.A. 1983); United States v. McDonagh, 14 M.J. 415 (C.M.A. 1983).

could have challenged the order that he be aboard his ship when it set out for a seven-month cruise.[22] Then, if he were not aboard the ship and subsequently charged with an unauthorized absence, he might have had a defense. Because the accused in that situation went on an unauthorized absence to avoid a seven-month cruise, something he would not have been obligated to do were he properly discharged at the appropriate time, he might have successfully challenged the lawfulness of the order. These measures would not help him had he murdered someone, however. Continuous attempts at securing a discharge would not be a defense to a rape or murder charge, but could be a defense only to military offenses such as violating an order or breaking restriction.

Counsel should ensure that soldiers understand that their status in the military does not terminate until they have their discharge certificates in hand; the arrival of their enlistment termination date is insufficient to change their status. Also, counsel should keep in mind the remedial measures suggested by the court in *Poole*, and the fact that continued, serious, good faith attempts at securing the discharge may provide a defense to some offenses. Captain Holly K. Desmarais.

Poking Holes in the "General Regulation" Dragnet

"Is there anything under the sun that *isn't* proscribed by punitive regulations?" cry defense counsel in moments of exasperation and despair. The answer is, "Yes." Two recent cases of the Army Court of Military Review should renew the faith of defense counsel who have suffered frequent defeat as a result of the ubiquitous general regulation.

In *United States v. Asfeld*[23] the Army Court of Military Review rejected the government practice of incorporating by reference provisions of a nonpunitive regulation into a punitive regulation. The accused in *Asfeld* allegedly telephoned a hospital co-worker who was on duty and communicated indecent language to her. The accused was charged under article 92, UCMJ,[24] with sexual harassment in violation of a lawful general regulation.[25] Paragraph 1-4 of Army Regulation 600-50[26] sets forth "general policies on proper conduct of official activities." Subsection *d* of that paragraph provides in part: "DA personnel will strictly adhere to the DA program of equal opportunity regardless of race, color, religion, sex, age, marital status, physical handicap, or national origin, *in accordance with AR 600-21* and CPR 713.[27]

Army Regulation 600-50 is a punitive regulation[28] that prohibits the use of a public position for personal benefit.[29] The government had not charged the accused in *Asfeld* with violating any specific provision of Army Regulation 600-50. The accused was charged with violating a "prohibition" of Army Regulation 600-21.[30] The Army court noted that although Army Regulation 600-21 is not a punitive regulation, it refers the reader to other sources for punitive enforcement of its provisions, none of which is Army Regulation 600-50.[31] The government argued that the accused's failure to "strictly adhere" to the provisions of Army Regulation 600-21 was in violation of paragraph 1-4d of Army Regulation 600-50 and thus punishable under the punitive provisions of Army Regulation 600-50.[32] The court rejected the government's argument of "incorporation by reference" as "not even superficially appealing," and characterized

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[22] *Poole*, 30 M.J. at 151.

[23] 30 M.J. 917 (A.C.M.R. 1990).

[24] 10 U.S.C. § 892 (1982) [hereinafter UCMJ].

[25] The specification read as follows:

> In that [the accused] ... did ... violate a lawful general regulation, to wit: paragraph 1-4d, Army Regulation 600-50, dated 20 November 1984, by wrongfully engaging [the victim] in a conversation of a sexual nature and making repeated oral comments of a sexual nature that were offensive to said [victim] ... .

[26] Army Reg. 600-50, Standards of Conduct for Department of the Army Personnel (20 Nov. 1984) [hereinafter AR 600-50].

[27] AR 600-50, para. 1-4d (emphasis added).

[28] Paragraph 1-4, AR 600-50 provides: "Failure to comply with this regulation may subject the offenders to administrative action or punishment under the Uniform Code of Military Justice."

[29] Paragraph 1-1 of AR 600-50 states: "Purpose: This regulation prescribes standards of conduct required of all DA personnel, regardless of assignment, to avoid conflicts and the appearance of conflicts between private interests and official duties."

Paragraph 1-4e of AR 600-50 provides:

> DA personnel will avoid any action, whether or not specifically prohibited by this regulation, that might result in or reasonably be expected to create the appearance of—
>
> (1) Using public office for private gain.
>
> (2) Giving preferential treatment to any person or entity.
>
> (3) Impeding Government efficiency or economy.
>
> (4) Losing independence or impartiality.
>
> (5) Making a Government decision outside official channels.

[30] Army Reg. 600-21, Equal Opportunity Program in the Army (30 Apr. 1986) [hereinafter AR 600-21].

[31] *Asfeld*, 30 M.J. at 922.

[32] *Id.*

the prosecution as a clear attempt "to do through the back door of Army Regulation 600-50 what it cannot do through the front door of Army Regulation 600-21."[33]

The court discussed the canons of construction by which regulatory provisions are interpreted to be punitive:

> The provisions of a regulation are interpreted "in light of the regulatory context *in which they are found* and *in view of the purpose of the regulation as a whole.*" Stated otherwise, the punitive nature of a regulation must be "self-evident" from the "entirety" of the regulation before nonconforming conduct can be prosecuted as a violation of that regulation.[34]

The court also noted that even if Army Regulation 600-21 had been punitive, prosecution under that regulation would have been prohibited by the preemption doctrine.[35] The court identified the types of conduct described in Army Regulation 600-21 that are made criminal by the Code.[36] The court pointed out the impropriety of such prosecutions by comparing the discrepancies in the burdens of proof and the maximum authorized punishments of UCMJ articles 94 and 134.[37]

The Army Court of Military Review also rejected an article 92 prosecution in *United States v. Peoples*,[38] holding that a command policy letter that purported to criminalize the consumption of alcohol during duty or field exercises was deficient as a general order. In *Peoples* the accused and his unit had been assigned to border guard duty in the Federal Republic of Germany. The accused went off duty at 0600 hours. At 1000 hours, he accompanied another soldier to a nearby community where, unaware of any prohibition, they each consumed two beers. Upon their return, both soldiers were administered field sobriety tests, which they passed, and a blood alcohol test, which registered 0.04 for the accused. The accused performed his next assigned shift of duty at 2200 hours that day.[39]

The accused was convicted pursuant to his plea of consuming alcoholic beverages "while participating in field duty" in violation of a "Division Commanding General Policy Letter," which read in pertinent part:

> ....
>
> 4. Intoxication or impairment will not be tolerated while on duty or during field exercises:
>
> a. [Division] soldiers will not consume alcoholic beverages while on duty (including meals and breaks). Soldiers on shift work will comply with this policy based on the established times of their normal duty and nonduty hours.
>
> ....
>
> e. [Division] personnel will not consume alcoholic beverages while participating in, or supporting CPX's [Command Post Exercises], FTX's [Field Training Exercises], or any other field duty related events. Violations of this policy may be punished under UCMJ.
>
> ....
>
> 6. A blood alcohol level of 0.05 percent or above is prohibited for military personnel on duty (AR 600-85, para. 1-10b). A soldier on duty with a blood alcohol level below 0.05 percent may be prosecuted under Article 112, UCMJ, drunk on duty, if mentally or physically impaired and unable to perform assigned duties.[40]

The court referenced the company commander's testimony that the accused had been off duty and free to visit the neighboring village. The court held that the circumstance of the accused's conduct "does not bespeak a 'field exercise' or 'field duty related event,'" which the policy letter purported to address.[41] Accordingly, the court found the accused's plea to be improvident.

The court in *Peoples* discussed other problems with the policy letter that may be instructive to counsel defending against general regulation prosecutions. In the court's view, the designation "DISTRIBUTION: A" indicated a limited dissemination and suggested problems with its use as a "general order:"

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[33] *Id.*

[34] *Id.* at 923 (citations omitted) (emphasis in original).

[35] *Id.*

[36] *Id.* at 923 n.7.

[37] *Id.* at 923.

[38] ACMR 8903177 (A.C.M.R. 30 Apr. 1990) (unpub.).

[39] *Peoples*, slip. op. at 1.

[40] *Id.* at 2. The policy letter in question specified it should be given "DISTRIBUTION: A."

[41] *Id.* at 3.

> Thus, a question is raised whether this policy letter is a "regulation" which is entitled to a presumption that its publication qualifies it as a "general" regulation. If a mere policy letter, the legal fiction of constructive notice would not lie and the appellant's lack of knowledge would constitute a possible defense.[42]

The court also observed that it was not clear from the language of the policy letter whether it was even intended to be a punitive regulation:

> Although the letter indicates that a violation of paragraph 4e "may be punished under the UCMJ," it does not indicate whether a violation of the strict letter of regulation is separately punishable under Article 92 of the Code or whether the letter contemplates punishment under Article 112 (drunk on duty) or Army Regulation 600-85, paragraph 1-10b (prohibiting a blood alcohol level of 0.05 per cent for any soldier on duty).[43]

The accused's company commander had testified that he perceived the policy to be one that required implementation by subordinate commanders. The court noted: "Such regulations do not qualify as punitive regulations."[44]

Despite the accused's statement to the military judge that guard duty was considered "field duty," the court questioned whether an off-duty border guard was fairly within the definition of "field duty" or "on duty" as found within the policy letter. In the court's view, such uncertainty raised the question of whether the policy letter provided constitutionally adequate notice of the prohibited conduct.[45] The conflicting interpretations presented at trial and contained within the allied papers suggested that the policy letter was void for vagueness. The court characterized these conflicting interpretations as an "additional problem" and concluded that either "the policy letter was not a general regulation or ... conflicting information may have been disseminated by the unit charged with primary responsibility for the mission."[46] These are additional avenues of exploration for defense counsel.

Asfeld and *Peoples* suggest a quick, albeit not exhaustive, checklist for defense counsel to use when evaluating purported general regulations or orders:[47] 1) Did the regulation receive widest dissemination?; 2) Does it contemplate subordinate implementation?; 3) Is the punitive nature of the regulation self-evident?; 4) Is the conduct preempted?; and 5) Does the regulation provide constitutionally adequate notice?

As these two cases illustrate, prosecutions under UCMJ article 92 for failure to obey general regulations can be successfully defended against *if* the purported regulation in question is read with care and challenged where appropriate. Captain Robert C. Wee.

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[42] *Id.* (citations omitted).

[43] *Id.*

[44] *Id.* at 4 (citing United States v. Blanchard, 19 M.J. 196, 197 (C.M.A. 1985)) (quoting United States v. Nardell, 45 C.M.R. 101 (C.M.A. 1972)) (if the order requires implementation by subordinate commanders to give it effect as a code of conduct, it will not qualify as a general order for the purpose of an article 92 prosecution).

[45] *Id.*; *see* United States v. Green, 22 M.J. 711 (A.C.M.R. 1986) (post regulation concerning consumption of alcohol suffered due process infirmity where it contained no "knowledge of duty" due-process safeguard).

[46] *Id.* at 4 n.1.

[47] *See also* Holmes, *Punitive v. Nonpunitive Regulation: The Emasculation of Article 92*, The Army Lawyer, Aug. 1975, at 6. Although written a number of years ago, this article is still useful in providing a framework within which defense counsel can analyze the validity of general regulations.

Clerk of Court Note

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES PER THOUSAND

Second Quarter Fiscal Year 1990; January-March 1990

	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.51	(2.05)	0.45	(1.78)	0.66	(2.64)	0.56	(2.23)	0.27	(1.09)
BCDSPCM	0.27	(1.08)	0.23	(0.93)	0.30	(1.21)	0.48	(1.92)	0.41	(1.64)
SPCM	0.05	(0.21)	0.04	(0.15)	0.09	(0.36)	0.05	(0.19)	0.00	(0.00)
SCM	0.42	(1.70)	0.40	(1.60)	0.42	(1.70)	0.65	(2.61)	0.00	(0.00)
NJP	26.94	(107.75)	28.67	(114.68)	24.04	(96.18)	27.85	(111.39)	21.03	(84.13)

Note: Based on average strength of 753412
Figures in parentheses are the annualized rates per thousand

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Contradicting a Witness on "Collateral" Matters

Introduction

Consider the following hypothetical trial situation. A witness has just testified about an alibi for the accused. According to her, the "stressed out" accused drove with her to Jamaica the day before the crime. They never left each other's sight during the next three days. As trial counsel, you can show that the witness is engaged to be married to the accused. Additionally, an acquaintance of the accused has offered to testify that the accused was not "stressed out." Further, you have evidence that the witness was alone in Minnesota, not in Jamaica with the accused, when the crime was committed. Finally, you can prove one cannot drive to the island of Jamaica. What can you do to impeach this witness after she has left the stand? What is the collateral issue rule concerning contradiction, and when does it come into play?

Reliable testimony is crucial in the search for justice. To this end, an adversarial trial permits each side to attack the credibility of witnesses who testify. This process is referred to as impeachment.

One method of impeaching a witness is by introducing evidence contradictory to the testimony given by the witness.[1] Evidence from any source other than the witness on the stand is referred to as extrinsic evidence. Generally, the advocate may not use extrinsic evidence to contradict a witness on a collateral matter. This note highlights the distinction between collateral and non-collateral matters and discusses the application of the collateral issue rule.

The Rule, Its Application, and Its Rationale

Extrinsic evidence intended *solely* to contradict an assertion of fact by a previous witness is admissible only when the assertion to be contradicted involves a material issue in the case. Consequently, when a witness makes an assertion on an immaterial or collateral matter, the advocate is generally "stuck with the answer" received. Extrinsic evidence is prohibited unless that evidence is independently admissible on a theory other than contradiction.

This collateral issue rule seeks to avoid diverting the court's attention to relatively unimportant side issues. What little probative value is found in contradicting assertions on collateral matters must be given up when balanced against the very real dangers of factfinder confusion, waste of judicial time, and undue prejudice.[2]

The Collateral-Noncollateral Distinction

When evidence is intended solely for contradiction on a matter, determining whether that matter is collateral or non-collateral is a question of *legal* relevance. In a non-legal context, evidence can be said to be *logically* relevant to some proposition if it tends to prove or disprove that proposition, whether or not that proposition is in controversy. However, to be *legally* relevant, evidence must be both logically relevant and material, or it must tend to prove or disprove a proposition that is part of the specific litigated controversy in the case.[3] Legally relevant evidence is never collateral and is admissible at trial regardless of its contradictory or impeachment value.[4] Once legally relevant evidence is available to the factfinder, the evidence may be considered both substantively and for any impeachment value it may have.

An argument, seemingly reasonable at first blush, can be made for admitting extrinsic evidence that contradicts any assertion, even if the assertion concerns a collateral issue. The argument is that a contradicted person is a less credible witness, and credibility is always important to a case. However, the logic of this argument would permit an advocate to expose and then contradict not only legally irrelevant testimony, but also any statement ever made by the witness on any subject, in any setting, and

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[1] Contradiction impeachment is not specifically mentioned in the Military or Federal Rules of Evidence, but is an accepted method under the common law. Provisions of Military Rule of Evidence 607, which generally allow attacks on credibility, certainly cover contradiction. Other ways of impeaching a witness include showing one's untruthful character through convictions, bad acts, and reputation; prior inconsistent statements of the witness; bias of the witness; and inability of the witness to perceive what the witness claimed to have perceived.

[2] In this situation, the law takes the Military Rule of Evidence 403 balancing process from the judge's discretion.

[3] An outstanding discussion of relevancy is found at E. Cleary, McCormick on Evidence 433-41 (1977).

[4] *See generally* 3A Wigmore, Evidence § 1003 (Chadbourn rev.).

under any circumstances. To spend court time to litigate every possible misstatement of a witness would make each trial excessively long, confusing, and impractical. A line must be drawn on contradiction as impeachment, and the collateral issue rule is that line.

In our hypothetical trial situation, the issue of whether the accused was "stressed out" is not part of the specific litigated controversy. The witness may have commented on the accused's condition to explain the motivation for taking the vacation, which, in turn, allowed for the alibi. However, the collateral issue rule applies, and extrinsic evidence may not be used to contradict the witness on this point for impeachment purposes.

When the Rule Does Not Apply

The collateral issue rule does not relegate witness credibility to unimportance. When witness credibility is crucial for evaluating testimony on the key issues in controversy, other evidentiary rules allow the credibility of the witness to be tested.

For example, extrinsic evidence may be used to show a witness's "bias, prejudice, or ... motive to misrepresent."[5] Such evidence could be considered contradiction only in the very broad sense that it tends to refute an implied claim to be testifying truthfully. When showing bias, the collateral issue rule does not apply.[6] While improper pressures on the witness are not part of the litigated controversy and may be deemed collateral, the interests of justice require admission of such evidence.[7] The key, non-collateral testimony of a witness cannot properly be evaluated without such evidence. Therefore, when pertinent testimony of the witness is inextricably tied to improper pressure, those pressures may be proven extrinsically.

In our hypothetical trial situation, trial counsel may impeach the witness with extrinsic evidence that she is engaged to the accused. The reliability of her testimony cannot be judged properly without consideration of her natural bias under this circumstance.

As with bias, the collateral issue rule does not preclude extrinsic evidence that a witness was mentally or physically incapable of perceiving the matters to which the witness testified.[8] Such proof could be considered a matter of contradiction; the witness was incapable of perceiving what he or she claimed to have perceived. Additionally, the infirmities of the witness are not part of the litigated controversy. However, the collateral issue rule does not apply because, the reliability of key testimony is inescapably and directly connected to the ability of the witness to perceive. Allowing extrinsic evidence to prove witness infirmities becomes a matter of common sense.

In our hypothetical, extrinsic evidence placing the witness alone in Minnesota on the day of the crime contradicts her claim that she was in Jamaica with the accused on the day of the crime. The collateral issue rule does not apply because the extrinsic evidence, if true, makes it physically impossible for the witness to know the accused was in Jamaica.

In the bias and incapability situations, the focus is not on contradicting specific testimony simply to impeach general credibility. Instead, the focus is on the witness. The reliability of key testimony is closely tied to the ability or willingness of the witness to give truthful, specific, legally relevant testimony. In such cases, the collateral issue rule does not apply. Now, place the focus on particular testimony instead of the witness. Situations arise when the falsity of certain testimony, even testimony on a collateral issue, makes other legally relevant testimony inherently unreliable. In those situations, justice calls for an exception to the collateral issue rule to allow for contradiction.

An Exception?

In giving testimony on a key point, a witness will necessarily set the scene with relatively unimportant background information and circumstances. Under the definitions and guidelines previously set out, such matters are collateral to the key points in the litigated controversy and normally may not be contradicted with extrinsic evidence to impeach the witness. However, it may be possible to show that one who actually witnessed an event absolutely could not be mistaken about certain background information. In that case, evidence of a discrepancy takes on much greater impeachment weight and should be admitted.

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[5]Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 608(c) [hereinafter MCM, 1984, and Mil. R. Evid. 608(c), respectively].

[6]The military may even subject bias evidence to some sort of collateral issue analysis. In United States v. Gonzalez, 16 M.J. 423 (C.M.A. 1983), the court deemed evidence of witness bias to be so tenuous as to be collateral, and, therefore, properly inadmissible. Such analysis clouds the strict definitions of what is collateral. The better analysis, suggested by the court, is that the concerned evidence did not tend to establish bias, the fact for which it was offered. Accordingly, the evidence is not logically relevant or admissible. The same result could be reached through Mil. R. Evid. 403 balancing of probative value and unfair prejudicial effect.

[7]The common law generally permits evidence of bias, interest, corruption, and coercion to show a motive to misrepresent. These methods are generally seen as covered by the Mil. R. Evid. 607 provision allowing attacks on credibility.

[8]Such common law impeachment, like contradiction, is often read into the Mil. R. Evid. 607 provision, which generally allows attacks on credibility.

In our hypothetical, reasonable people could differ or be mistaken on whether the accused was "stressed out." Two people could come to different conclusions on the accused's condition without one being a liar. However, if the witness had actually accompanied the accused to Jamaica, she must have known Jamaica could not be reached by car. Although methods of reaching Jamaica are collateral to the issues in the case at hand, extrinsic proof that Jamaica is an island unreachable by car makes the remainder of the testimony by the fiance inherently unreliable. The court should admit this contradictory extrinsic evidence on an admittedly collateral matter to prevent a miscarriage of justice.

McCormick cites two examples that distinguish the rule and the exception. In the first example,[9] a witness to a crime remarks that the day was cold and that he was wearing his green sweater. Showing that the day was warm or that the witness was wearing a red sweater has very little, if any, impeachment value. If the witness remembered feeling cold or was mistaken as to the sweater he wore, these points are unimportant and say virtually nothing about the credibility of the witness or the reliability of the key testimony. The collateral issue rule applies.

In the second example,[10] however, a defense witness at an arsenic poisoning murder trial furthered an accidental ingestion theory by testifying that he observed arsenic left out for rats in the cellar where provisions were kept. At the outset, the credibility of the defense witness and the storage location of provisions were not matters provable in either side's case-in-chief. These issues were collateral, not part of the specifically litigated controversy. However, the court did not find the collateral issue rule to be applicable. It ruled admissible the contradictory extrinsic evidence that no provisions were kept in the cellar. If the defense witness had truly observed what he claimed, he could not have been mistaken about the storage of provisions in the cellar. Testimony that provisions were not kept in the cellar, if believed, would have effectively and directly unravelled the key testimony of the defense witness. Consequently, justice required admissibility of the contradictory evidence.

Circumstances similar to the "could not have been mistaken" example may be viewed as giving rise to an exception to the collateral issue rule. When contradiction of evidence on an otherwise collateral matter becomes inherently indicative of the reliability of legally relevant evidence, contradiction evidence must be admitted. In that instance, justice requires recognition of an exception to the collateral issue rule.[11]

Conclusion

Contradiction is a basic form of impeachment that has the potential for use in every case. Counsel and judges must be able to recognize and resolve collateral issue problems. The distinction between collateral and non-collateral issues is crucial in the proper resolution of everyday evidentiary problems. As with every rule, exceptions are sometimes appropriate. Successful handling of this difficult evidentiary area will depend on one's knowledge of the rule, the underlying policies, and the circumstances that justify an exception. MAJ Warner.

Idaho v. Wright—Out-of-Court Statements and the Confrontation Clause

A common occurrence in cases involving a child victim is that the child will make a statement to a parent, sibling, police officer, counselor, or doctor concerning the offenses, but the child will be unavailable to testify at trial. On June 27, 1990, the Supreme Court decided such a case, *Idaho v. Wright*. The court addressed confrontation issues that arise when an out-of-court statement is admitted under the residual hearsay exception.[12]

Wright was convicted of two counts of lewd conduct with a minor under the age of sixteen. She apparently restrained her 2½ year old and 5½ year old daughters while her boyfriend raped them.

The issue on appeal concerned a statement by the youngest daughter to a pediatrician. The trial court determined that the child was unavailable and admitted her statement under the residual hearsay exception. Wright appealed, claiming a violation of her sixth amendment confrontation rights. The Idaho Supreme Court agreed and reversed because the statement was unreliable and because of the pediatrician's interview techniques. He had asked leading questions, had not videotaped the interview, and had expected certain answers from the child.

The Supreme Court concentrated on the confrontation clause issue and analyzed the child's statement to the pediatrician to determine whether it had sufficient indicia of reliability. The Court found insignificant the interview techniques used by the pediatrician:

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[9] E. Cleary, McCormick on Evidence 97-98 (1977).

[10] *Id.* (citing Stephens v. People, 19 N.Y. 549, 572 (1859)).

[11] *Id.* In *Stephens* the court effected the exception to the collateral issue rule by referring to the "must have known" evidence as "not strictly collateral."

[12] No. 89-260 (U.S. June 27, 1990).

> Although the procedural guidelines propounded by the court below may well enhance the reliability of out-of-court statements of children regarding sexual abuse, we decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.[13]

The Supreme Court once again stressed the difference between admissibility as a hearsay exception and scrutiny under the confrontation clause: "The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule."[14]

Applying the traditional analysis under *Ohio v. Roberts*,[15] the Supreme Court noted that all parties agreed that the child was unavailable. The Court looked to the indicia of reliability of the statement. At that point, the Court appeared to depart from precedent and made it more difficult for the government to prove admissibility under the confrontation clause. To show sufficient indicia of reliability, the government must now rely on factors that would tend to show that the child was truthful at the time the statement was made. For instance, some appropriate factors would be the spontaneity and consistent repetition of the statement; the child's mental state; use of appropriate terminology for a child that age; and lack of motive to fabricate.[16] The government cannot bootstrap by using extrinsic evidence to prove reliability. The government could not, for instance, use the accused's confession, physical evidence, or corroboration among witnesses' statements. "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."[17]

The dissent, Justices Blackmun, White, Kennedy, and Chief Justice Rehnquist, called the majority opinion as "unworkable as it is illogical."[18] The dissent mentioned the extrinsic corroboration in *Wright*, including the physical evidence, the opportunity for the offense to occur, and the consistency among the two daughters' statements. The dissent stressed that these factors could be challenged by the defense and assessed by the trial court in an objective and critical manner. As a result, they should be accepted as potential indicators of reliability.

The benchmark case from the Court of Military Appeals addressing this issue is *United States v. Hines*.[19] The factors applied in *Hines* to determine whether there was sufficient indicia of reliability included: the oath and detail of the witness's statement; the dependence of the witness on the accused; whether there was recantation by the witness; the reasons for the witness not testifying; the witness's reputation for truthfulness; whether there was a motive to lie; the extent of first-hand knowledge; the neighbors' observations; whether there was corroboration among witnesses; and the accused's confession. The Court of Military Appeals relied heavily on Hines's confession, often only admitting statements consistent with the confession. Where does *Wright* leave *Hines*? Is *Wright* as unworkable and illogical as the Supreme Court dissenting Justices think? Finally, if the primary consideration is that the out-of-court statement is reliable, and "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility,"[20] then why not apply all relevant evidence, like physical evidence and the accused's confession?

Counsel must be conscious of the requirements in *Wright*! The government should concentrate on the factors to support reliability mentioned in *Wright*, and the defense should raise a confrontation violation if these factors do not exist. MAJ Merck.

The "Safe-Sex" Order Held to be Lawful When the "Victim" is a Civilian

United States v. Dumford[21] is the latest case[22] to consider the legality of giving the "safe-sex"

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[13] 1990 WL 85262 (U.S.), at 19.

[14] 1990 WL 85262 (U.S.), at 13.

[15] 448 U.S. 56 (1980).

[16] 1990 WL 85262, at 23.

[17] 1990 WL 85262, at 24.

[18] 1990 WL 85262, at 38.

[19] 23 M.J. 125 (C.M.A. 1986).

[20] 1990 WL 85262, at 20.

[21] 30 M.J. 137 (C.M.A. 1990), *affirming* 28 M.J. 836 (A.F.C.M.R. 1989).

[22] Earlier appellate decisions addressing the legality of the so-called "safe-sex" order include United States v. Womack, 29 M.J. 88 (C.M.A. 1989), *affirming*, 27 M.J. 630 (A.F.C.M.R. 1988); United States v. Ebanks, 29 M.J. 926 (A.F.C.M.R. 1989); United States v. Sergeant, 29 M.J. 812 (A.C.M.R. 1989); United States v. Negron, 28 M.J. 775 (A.C.M.R. 1989). The legality of the order has likewise been discussed in several of articles. *See, e.g.*, Milhizer, *Legality of the "Safe-Sex" Order to Soldiers Having AIDS*, The Army Lawyer, Dec. 1988, at 4; Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, The Army Lawyer, Jan. 1988, at 17; TJAGSA Practice Note, *The Legality of the "Safe-Sex" Order When the "Victim" is a Civilian*, The Army Lawyer, May 1990, at 62; TJAGSA Practice Note, *Army Court of Military Review Holds that the "Safe-Sex" Order is Constitutional*, The Army Lawyer, Mar. 1990, at 35; TJAGSA Practice Note, *Court of Military Appeals Decides AIDS Related Cases*, The Army Lawyer, Dec. 1989, at 32; TJAGSA Practice Note, *AIDS Update*, The Army Lawyer, Mar. 1989, at 29.

order[23] to service members with the Human Immunodeficiency Virus (HIV).[24] *Dumford* is significant because it is the first time that the Court of Military Appeals has addressed the legality of the order when applied to consensual, nondeviant sexual intercourse with a female civilian. The court concluded in *Dumford* that the order was not overbroad and had a valid military objective, and thus affirmed the accused's conviction for disobedience.[25]

The Court of Military Appeals, in *United States v. Womack*,[26] had previously addressed the legality of the "safe-sex" order when applied to homosexual sodomy with another service member. After having tested positive for the HIV virus, the accused in *Womack* received a standard "safe-sex" order from his commander.[27] The accused thereafter performed fellatio upon a male airman who was sleeping. The accused did not inform the airman of his infection, did not ensure that barrier protection was used, and did not obtain the airman's consent. The accused was ultimately tried for and convicted of disobeying a lawful order.[28]

The court initially observed that the order given to the accused in *Womack* had a sufficiently strong military purpose[29] and was expressed with the requisite specificity and certainty.[30] Significantly, the court wrote that the accused was not entitled to relief on the basis that the order might be overly broad in some hypothetical situations (for example, where his sexual partner was a civilian having no connection to the military) when the order, as applied to the accused, has an obvious military connection.[31] Similarly, the court specifically noted that forcible sodomy is not protected conduct when addressing the constitutionality of the order.[32] Thus, the court in *Womack* reserved judgment regarding the constitutionality and legality of the "safe-sex" order when the order is applied to heterosexual intercourse with a civilian.

Following *Womack*, two court of review decisions—*United States v. Sargeant*[33] and *United States v. Ebanks*[34]—concluded that, at least in some circumstances, the "safe-sex" order is adequately related to valid military duties and purposes to be lawful, even when the victim is a civilian.[35] The court in *Sargeant*[36] took an expansive view, commenting in dicta[37] that "the

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[23]The Army's regulation requiring commanders to issue the "safe-sex" order in appropriate cases is Army Reg. 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (11 Mar. 1988) (IC, 2824Z Mar. 1989) (IO1, 22 May 1989) [hereinafter AR 600-110]. The sample order is stated in the following terms: "You will verbally advise all prospective sexual partners of your diagnosed condition before engaging in any sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner." *Id.*, figure 2-2. The soldier is also ordered not to donate blood, sperm, organs, or other tissues; and to notify health care workers of his diagnosed condition prior to seeking or receiving treatment. *Id.* The other services require commanders to issue similar "safe-sex" orders. *See generally* Milhizer, *supra* note 22, at 4 n.3.

[24]The military tests for the presence of the HIV antibody, rather than testing directly for the virus. The presence of an HIV antibody indicates that the person has been exposed to the Acquired Immunodeficiency Syndrome [hereinafter AIDS]. The fact that someone is HIV positive does not mean that the infected person has AIDS or will necessarily develop AIDS, nor does it mean that the person has developed an immunity to AIDS. Baruch, *AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome*, 22 Torts & Ins. L.J. 165, 167 (1987). Experts have opined, however, "that 95% to 99% of those persons infected with HIV will develop the AIDS disease eventually." Sinkfield and Houser, *AIDS and the Criminal Justice System*, 10 Journal of Legal Medicine 103, 105 n.7 (1989) (quoted in United States v. Johnson, 30 M.J. 53, 55 n.4 (C.M.A. 1990)). Also, many experts are now projecting that virtually all persons having AIDS will ultimately die of the disease. *See generally* G. Mandell, R. Douglass and J. Bennett, Principles and Practices of Infectious Diseases, chap. 106 (3d ed. 1990).

[25]A violation of Uniform Code of Military Justice art. 90, 10 U.S.C. § 890 (1982) [hereinafter UCMJ].

[26]29 M.J. 88 (C.M.A. 1989).

[27]The order given to the accused, an airman, provided, *inter alia*, that the accused: 1) must inform all present and future sexual partners of his infection; 2) must avoid transmitting the infection by taking affirmative steps to protect his sexual partners from contacting his blood, semen, urine, feces, or saliva; and 3) must refrain from any acts of sodomy or homosexuality as proscribed by the UCMJ regardless of whether his partner consents. *Id.* at 89. The Army regulation pertaining to the "safe-sex" order does not explicitly include the third aspect of the order given to Womack. *See* AR 600-110, figure 2-2 (discussed *supra* note 23).

[28]*Id.* at 89-90.

[29]The court noted, as it had in United States v. Woods, 28 M.J. 318, 319-20 (C.M.A. 1989), that the military and society at large have a compelling interest in having service members remain healthy and capable of performing their duty. *Womack*, 29 M.J. at 90. The "safe-sex" order, therefore, relates to a valid military purpose. *See* MCM, 1984, Part IV, para. 14c(2)(a)(iii); *see also* United States v. Negron, 28 M.J. 775, 778 (A.C.M.R.), *aff'd*, 29 M.J. 324 (C.M.A. 1989).

[30]The court observed that a military order must be a clear and specific mandate to do a particular act. *Id.* at 90 (citing United States v. Beattie, 17 M.J. 537 (A.C.M.R. 1983)), and instructed that an "order must be worded so as to make it specific, definite, and certain, and it may not be overly broad in scope or impose an unjust limitation of personal rights." *Womack*, 29 M.J. at 90 (citing United States v. Wartsbaugh, 45 C.M.R. 309 (C.M.A. 1972), and United States v. Wysong, 26 C.M.R. 29 (C.M.A. 1958)).

[31]*Womack*, 29 M.J. at 91 (citing Brockett v. Spokane Arcades, 472 U.S. 491 (1985), and Parker v. Levy, 417 U.S. 733 (1974)).

[32]*Womack*, 29 M.J. at 91 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

[33]29 M.J. 812 (A.C.M.R. 1989).

[34]29 M.J. 926 (A.F.C.M.R. 1989).

[35]For a discussion of *Sargeant* and *Ebanks*, see TJAGSA Practice Note, *The Legality of the "Safe-Sex" Order When the "Victim" Is a Civilian*, The Army Lawyer, May 1990, at 62.

[36]29 M.J. 812 (A.C.M.R. 1989).

[37]The victims in *Sargeant* were other service members. *Sergeant*, 29 M.J. at 814.

military has a proper interest in taking reasonable steps to ensure that its soldiers who have the AIDS virus do not infect their sexual partners, regardless of their status."[38] The court in *Ebanks*[39] relied on a more limited rationale for finding a military purpose for the "safe-sex" order where some of the accused's partners were civilians. The court observed in that case that

> the uninformed or unprotected sex that violated the order was with one partner who was another Air Force member and two others who were dependent wives of Air Force members. All three individuals were entitled to medical care from military medical facilities and had the potential for further sexual activity with other military members. The valid military purpose of appellant's order was to prevent the spread of a deadly, contagious disease and by doing so safeguard the health of members of the Air Force to insure their ability to perform Air Force missions.[40]

In *Dumford* the Court of Military Appeals wrote a sweeping opinion affirming the accused's conviction for disobedience. The court first observed that the "safe-sex" order at issue in *Dumford* was similar in content to the one challenged and found to be sufficient in *Womack*.[41] Accordingly, the court concluded that the order in *Dumford* was "equally clear, definite, and certain as to its requirements."[42]

The accused nonetheless contended that the order was overly restrictive of personal rights when applied to consensual, nondeviant sexual intercourse with a female civilian. The court rejected this argument, observing that the "order did not prohibit sexual contact; rather, it set forth terms under which [the accused] could engage in such activities. Thus, even to the extent that the order may have limited [the accused's] freedom, it [was] not so broadly drawn as to warrant invalidating [it]."[43]

The court likewise rejected the accused's argument that the order lacked any valid military purpose because his partner was a civilian rather than another service member. The court wrote unequivocally that "when a servicemember is capable of exposing another person to an infectious disease, the military has a legitimate interest in limiting his contact with others, including civilians, and otherwise preventing the spread of that condition."[44] Indeed, the court broadly observed that "[w]e have absolutely no doubt that preventing a servicemember who has HIV from spreading it to the civilian population is a public duty of the highest order and, thus, is a valid military objective."[45]

Dumford apparently closes the door on defense arguments that the "safe-sex" order cannot be applied to consensual, nondeviant sexual intercourse with female civilians. Quite to the contrary, *Dumford* suggests that all orders designed to limit the spread of dangerous diseases will be found lawful, provided that they are clear, definite, and not unnecessarily restrictive of personal rights and freedoms. Commanders may now confidently issue the "safe-sex" order as one means of responding to the considerable challenges of AIDS. MAJ Milhizer.

Involuntary Manslaughter Based Upon an Assault

In *United States v. Jones*[46] the Court of Military Appeals discussed the two distinct theories of involuntary manslaughter recognized under military law.[47] Specifically, the court reiterated that assault consummated by a battery is an offense directly affecting the person and can serve as the basis for an involuntary manslaughter conviction under article 119(b)(2) of the Uniform Code of Military Justice.[48] Before discussing the specific facts of *Jones*, a brief review of involuntary manslaughter under military law is appropriate.

Article 119(b) defines the offense of involuntary manslaughter for the military as follows:

> Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—
>
> (1) by culpable negligence; or

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[38] *Id.* at 815 n.6.

[39] 29 M.J. 926 (A.F.C.M.R. 1989).

[40] *Id.* at 929.

[41] *Dumford*, 30 M.J. at 137-38.

[42] *Id.* at 138.

[43] *Id.* The court also noted in this regard that "many states have enacted statutes limiting the personal liberties of those persons who carry HIV, statutes which are far more restrictive" than the order at issue in *Dumford*. *Id.* (citing *Womack*, 29 M.J. at 90).

[44] *Dumford*, 30 M.J. at 138 (citing United States v. Johnson, 30 M.J. 53 (C.M.A. 1990)).

[45] *Dumford*, 30 M.J. at 138. The court thus concluded that unwarned and unprotected sex by a service member infected with the HIV virus could be punished as service discrediting conduct under UCMJ article 134. *Id.* (citing United States v. Woods, 28 M.J. 318 (C.M.A. 1989)).

[46] 30 M.J. 127 (C.M.A. 1990).

[47] The judges, in three separate opinions, also discussed at length whether the statement of the victim's mother about the accused's anger and jealousy regarding the child victim was admissible as an excited utterance. *See generally* Mil. R. Evid. 803(2). A discussion of that aspect of the court's opinion is beyond the scope of this note.

[48] UCMJ art. 119.

(2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118),[49] directly affecting the person;

is guilty of involuntary manslaughter and shall be punished as a court-martial may direct.[50]

Most involuntary manslaughter convictions discussed by the military's appellate courts are based upon the culpable negligence theory of the offense.[51] Convictions for involuntary manslaughter by culpable negligence have been returned for a wide variety of misconduct resulting in death, including the drug overdose death of another;[52] child-abuse related deaths;[53] drunken and reckless driving;[54] turning over operation of a car to an intoxicated person who causes a traffic fatality;[55] failing to follow safety rules and driving after the brakes have failed, causing a fatal traffic accident;[56] and culpably negligent surgical procedures.[57] Illustrative examples of involuntary manslaughter by culpable negligence found in the Manual include

negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; and carelessly leaving poisons or dangerous drugs where they may endanger life.[58]

Less common in the decisional law is a discussion of involuntary manslaughter by the perpetration or attempted perpetration of an offense directly affecting the person. The Manual defines the term "an offense directly affecting the person" as being "one affecting some particular person as distinguished from an offense affecting society in general."[59] The Manual lists various types of assault,[60] battery,[61] false imprisonment,[62] voluntary engagement in an affray,[63] and maiming[64] as constituting offenses directly affecting the person.[65] Other offenses not specifically mentioned in subparagraph 44c of the Manual, such as cruelty and maltreatment,[66] and kidnapping,[67] for example, could likewise support a conviction for involuntary manslaughter under this theory.

On the other hand, merely selling or providing a drug to another person, who later uses it and dies as a result, does not constitute an offense directly affecting the person.[68] The courts have generally concluded that such misconduct affects society generally, rather than the purchaser of the drug individually.[69] If the seller goes further and assists the purchaser in injecting or ingesting

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[49] The offenses named in clause (4) of article 118—burglary, sodomy, rape, robbery, and aggravated arson—can serve as a basis for conviction of felony murder. *See* UCMJ art. 118(4); *see also* MCM, 1984, Part IV, para. 43b(4)(d); *e.g.*, United States v. Borner, 12 C.M.R. 62 (C.M.A. 1953).

[50] *See* MCM, 1984, Part IV, para. 44a.

[51] The *Manual* defines "culpable negligence" as follows:

> Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission.

MCM, 1984, Part IV, para. 44c(2)(a)(i).

[52] *E.g.*, United States v. Henderson, 23 M.J. 77 (C.M.A. 1986); United States v. Dinkel, 13 M.J. 400 (C.M.A. 1982); United States v. Mazur, 13 M.J. 143 (C.M.A. 1982); *see generally* Milhizer, *Involuntary Manslaughter and Drug Overdose Deaths: A Proposed Methodology*, The Army Lawyer, Mar. 1989, at 10.

[53] *E.g.*, United States v. Brown, 26 M.J. 148 (C.M.A. 1988); United States v. Baker, 24 M.J. 354 (C.M.A. 1987); United States v. Mitchell, 12 M.J. 1015 (A.C.M.R. 1982).

[54] *E.g.*, United States v. Cooke, 18 M.J. 152 (C.M.A. 1984).

[55] United States v. Brown, 22 M.J. 448 (C.M.A. 1986).

[56] United States v. Cherry, 22 M.J. 284 (C.M.A. 1986).

[57] *See* United States v. Ansari, 15 M.J. 812 (N.M.C.M.R. 1982). *But see* United States v. Billig, 26 M.J. 744 (N.M.C.M.R. 1988).

[58] MCM, 1984, Part IV, para. 44c(2)(a)(i).

[59] *Id.*, Part IV, para. 44c(2)(b).

[60] Violations of UCMJ arts. 90, 91, 128, and 134.

[61] A violation of UCMJ art. 128.

[62] *See* UCMJ art. 97 (unlawful detention).

[63] *See* UCMJ arts. 116 (rioting or breach of peace) and 128; *see generally* United States v. O'Neal, 36 C.M.R. 189 (C.M.A. 1966) (discusses the law pertaining to mutual affrays).

[64] A violation of UCMJ art. 124.

[65] MCM, 1984, Part IV, para. 44c(2)(b).

[66] A violation of UCMJ art. 93.

[67] A violation of UCMJ art. 134; *see* MCM, 1984, Part IV, para. 92.

[68] Milhizer, *supra* note 52, at 16 (citing United States v. Sargent, 18 M.J. 331, 338-39 (C.M.A. 1984), and *Henderson*, 23 M.J. at 82 (Everett, C.J., dissenting)).

[69] *Sargent*, 18 M.J. at 338 (and the cases cited therein).

the drug, however, the sale in conjunction with the subsequent conduct by the seller becomes one that directly affects the person for purposes of article 119(b)(2).[70]

Virtually all of the reported cases addressing involuntary manslaughter by an offense directly affecting the person are based upon an assault perpetrated by the accused against the deceased.[71] In *United States v. Wilson*,[72] for example, the accused and a companion became involved in a violent confrontation with several intoxicated security policemen.[73] During the encounter, the accused went to his dormitory room, obtained a bed extender, and went back outdoors. He then struck one of the security policemen, who ultimately died as a result of the blow.[74]

The accused in *Wilson* was charged with premeditated murder.[75] The Court of Military Appeals observed that the bed extender, as used by the accused, would qualify as "a dangerous weapon or other means likely to produce death or grievous bodily harm."[76] The accused thus committed an aggravated assault upon his victim that caused the victim's death. Where, as in *Wilson*, evidence is presented that the accused did not intend to kill or inflict grievous bodily harm,[77] the lesser offense of involuntary manslaughter is raised under an article 119(b)(2) theory. Accordingly, the court concluded in *Wilson* that the military judge erred by failing to instruct upon involuntary manslaughter by an offense directly affecting the person as a lesser offense of the charged premeditated murder.[78]

In the recently decided *Jones* case, the accused, who was charged with murder, pleaded guilty to involuntary manslaughter by culpable negligence.[79] The victim, who was the accused's nine-month-old son, died as a result of being violently shaken by the accused.[80] The military judge ultimately found the accused guilty of involuntary manslaughter, but under the theory of an offense directly affecting the person.[81]

The Court of Military Appeals agreed that the evidence supported the accused's guilt under the article 119(b)(2) theory of involuntary manslaughter. The accused committed an offer type assault[82] upon the victim, followed by a battery,[83] resulting from culpable negligence.[84] Citing *United States v. Epps*,[85] the court concluded that the accused's conviction for involuntary manslaughter by an offense directly affecting the person could be affirmed.[86]

As *Jones* illustrates, involuntary manslaughter can be supported by two distinct theories of culpability. The less used theory—based upon an assault directly affecting the person—can be constituted when the accused assaults the victim and the victim ultimately dies as a result of the assault. Depending on the theory of assault that is alleged, an intent by the accused to kill or seriously injure the victim is not necessary for this offense, nor is it required that the accused act in a culpably negligent manner. Trial practitioners must become familiar with these and other aspects of involuntary manslaughter, given the

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[70] Milhizer, *supra* note 52, at 16 (citing *Sargent*, 18 M.J. at 339).

[71] *E.g.*, United States v. Madison, 34 C.M.R. 435 (C.M.A. 1964); United States v. Fox, 9 C.M.R. 95 (C.M.A. 1953); United States v. Irwin, 13 M.J. 749 (A.F.C.M.R. 1982), *aff'd in part*, 22 M.J. 342 (C.M.A.), *cert. denied*, 479 U.S. 852 (1986); *see* United States v. Johnson, 11 C.M.R. 209 (C.M.A. 1953).

[72] 26 M.J. 10 (C.M.A. 1988).

[73] *Id.* at 12.

[74] *Id.*

[75] A violation of UCMJ art. 118(1).

[76] 26 M.J. at 13 (quoting UCMJ art. 128(b)(1)).

[77] The accused denied having any intent to kill or grievously injure. *Id.*

[78] *Id.* at 15. The military judge did instruct upon the lesser offense of involuntary manslaughter by culpable negligence, pursuant to a request by the defense counsel. *Id.* at 12. The Court of Military Appeals determined, however, that involuntary manslaughter under a culpable negligence theory was not raised by the evidence. *Id.* at 12-13. The court concluded further that the judge's instruction on involuntary manslaughter by a theory not raised by the evidence was insufficient to advise the members about the lesser included offense of involuntary manslaughter, based upon a separate theory, which was raised by the evidence.

[79] *Jones*, 30 M.J. at 128.

[80] *See generally* United States v. Brown, 26 M.J. 148 (C.M.A. 1988), where the accused was convicted of involuntary manslaughter by culpable negligence for killing his five-week-old step-son by violently shaking him.

[81] *Jones*, 30 M.J. at 130.

[82] "An 'offer' type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required." MCM, 1984, Part IV, para. 54c(1)(b)(ii).

[83] *See id.*, Part IV, para. 54c(2).

[84] For a good discussion of assault by a culpably negligent offer, see United States v. Pittman, 42 C.M.R. 720 (A.C.M.R. 1970).

[85] 25 M.J. 319, 323 (C.M.A. 1987) ("[I]f an accused pleads guilty and then at the providence inquiry, he gives sworn testimony which clearly establishes his guilt of a different but closely-related offense having the same maximum punishment, [the Court of Military Appeals] may treat that accused's pleas of guilty as provident.").

[86] *Jones*, 30 M.J. at 131.

frequency that it is raised at courts-martial both as the charged crime and as a lesser included offense. MAJ Milhizer.

Court Strictly Interprets Legal Efficacy

In its recent decision in *United States v. Hopwood*,[87] the Court of Military Appeals unequivocally restated that forgery under the Uniform Code of Military Justice requires that the subject document have legal efficacy. In doing so, the court clearly instructed that documents relating to mere preliminary steps in a commercial transaction, even if necessary to completing the transaction, do not satisfy the strict requirements of legal efficacy under military law.

Forgery, as proscribed by article 123,[88] can be committed in two distinct ways: by making and altering, or by uttering.[89] Both types of forgery have as an element of proof the requirement that the writing or signature have legal efficacy.[90] The Manual defines legal efficacy in relation to the effect of the writing or signature: "The writing must be one which would, if genuine, apparently impose a legal liability on another, as a check or promissory note, or change that person's legal rights or liabilities to that person's prejudice, as a receipt."[91] The requirement for legal efficacy has long been enforced by the military's appellate courts.[92]

In the landmark case of *United States v. Thomas*[93] the Court of Military Appeals addressed the issue of legal efficacy in connection with a forgery charge. The court found that a false credit reference, commonly known as a "Commanding Officer's Letter," could not be the subject of a forgery.[94] The court determined that the document lacked legal efficacy and thus it could not support a forgery charge even though the accused intended to use it to obtain a loan.[95] The court wrote:

> The record before us leaves no doubt that the false document was intended to facilitate appellant's obtaining the loan and that, if genuine, it might have had a decisive effect on the application. In that sense, the document could readily be seen "as a step in a series of acts which might perfect a legal right or liability." But, again, the test for forgery—and derivatively for uttering a forged writing—is not whether the writing was a cause in fact or a *sine*

[87] 30 M.J. 146 (C.M.A. 1990).

[88] UCMJ art. 123.

[89] UCMJ art. 123 provides:

> Any person subject to this chapter who, with intent to defraud—
>
> (1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or
>
> (2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered; is guilty of forgery and shall be punished as a court-martial may direct.

[90] MCM, 1984, Part IV, para. 48b, sets forth the elements of both types of forgery. The second element of both types of forgery, as reflected below, impose the legal efficacy requirement.

> (1) *Forgery—making or altering.*
>
> (a) That the accused falsely made or altered a certain signature or writing;
>
> (b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and
>
> (c) That the false making or altering was with the intent to defraud.
>
> (2) *Forgery—uttering.*
>
> (a) That a certain signature or writing was falsely made or altered;
>
> (b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;
>
> (c) That the accused uttered, offered, issued, or transferred the signature or writing;
>
> (d) That at such time the accused knew that the signature or writing had been falsely made or altered; and
>
> (e) That the uttering, offering, issuing or transferring was with intent to defraud.

Id.

[91] *Id.*, Part IV, para. 48c(4).

[92] *See, e.g.*, United States v. Diggers, 45 C.M.R. 147 (C.M.A. 1972) (forged military order to obtain approval of travel request had legal efficacy); United States v. Phillips, 34 C.M.R. 400 (C.M.A. 1964) (carbon copy of allotment authorization form lacked legal efficacy); United States v. Farley, 29 C.M.R. 546 (C.M.A. 1960) (false insurance applications lacked legal efficacy); United States v. Noel, 29 C.M.R. 324 (C.M.A. 1960) (form similar to a letter of credit had legal efficacy); United States v. Addye, 23 C.M.R. 107 (C.M.A. 1957) ("Request for Partial Payment" letter had legal efficacy); United States v. Strand, 20 C.M.R. 13 (C.M.A. 1955) (letter lacked legal efficacy); United States v. Jedele, 19 M.J. 1987 (A.F.C.M.R. 1985) (bankcard charge slip had legal efficacy); United States v. Gilbertsen, 11 M.J. 675 (N.M.C.M.R. 1981) (suspect's rights acknowledgement form lacked legal efficacy); United States v. Schwarz, 12 M.J. 650 (A.C.M.R. 1981), *aff'd*, 15 M.J. 109 (C.M.A. 1983) (allotment form had legal efficacy); United States v. Benjamin, 45 C.M.R. 799 (N.C.M.R. 1972) (prescription form had legal efficacy).

[93] 25 M.J. 396 (C.M.A. 1988).

[94] *Id.* at 401-02.

[95] *Id.*

qua non but whether it "would, if genuine, apparently *impose* a legal liability on another or *change* his legal right or liability to his prejudice."[96]

Following *Thomas*, several forgery convictions have been reversed by the Army Court of Military Review because the subject document lacked legal efficacy.[97]

In *Hopwood* the accused falsely signed the name of his brother and sister-in-law on a credit application to be used for purchasing an automobile.[98] This application was one in a series of several documents that the accused was required to prepare and present in order to make the purchase.[99] Indeed, the Court of Military Appeals described the loan application as being a step that was probably necessary for the accused's "entry into a transaction that would appear to create legal rights and liabilities."[100]

The Air Force Court of Military Review[101] decided that the loan application had "legal efficacy" as defined by military law. The majority of the court apparently interpreted legal efficacy to be a relative concept.[102] The court concluded that the credit application was sufficiently similar to commercial papers, which clearly have legal efficacy, to satisfy the requirements of article 123.[103]

The Court of Military Appeals disagreed, finding that the loan application in *Hopwood* lacked legal efficacy. As noted earlier, the court acknowledged that the loan application was probably a necessary, preliminary step for the accused to enter into a commercial transaction that created legal rights and liabilities.[104] Citing *Thomas*, the court observed further, however, that

> [t]he credit application could not be "forged" in violation of Article 123 because, even when considered in light of companion documents and the intended purchase transaction, the application itself, if genuine, would not create any legal right or liability on the part of the purported makers.[105]

Although the accused's misconduct with respect to the loan application thus did not constitute forgery under article 123, it may have been punishable by court-martial under some other charge.[106] In fact, the Air Force court specifically observed that possible prosecutorial options included larceny and wrongful appropriation,[107] attempts,[108] and the incorporation or assimilation of other statutes under the third clause of article 134.[109] The Court of Military Appeals agree that these alternative charging options might be available.[110]

The obvious lesson from *Hopwood* is that the concept of legal efficacy should be construed strictly. Trial counsel must be aware of this requirement for forgery when deciding whether to recommend charging this offense. They must ensure that the issue is properly investigated before making such a recommendation. Defense counsel must likewise investigate whether the subject document

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[96] *Id.* at 401 (citations omitted) (emphasis in original).

[97] *E.g.*, United States v. Vogan, 27 M.J. 883 (A.C.M.R. 1989) (ration control anvil card lacked legal efficacy); United States v. Walker, 27 M.J. 878 (A.C.M.R. 1989) (military identification card lacked legal efficacy); United States v. Ross, 26 M.J. 933 (A.C.M.R. 1988) (prescription lacked legal efficacy); United States v. Hart, ACMR 8800211 (A.C.M.R. 9 Sep. 1988) (unpub.) (ration control anvil cards lacked legal efficacy); United States v. Grayson, ACMR 8702884 (A.C.M.R. 27 July 1988) (unpub.) (honorable discharge certificate, certificate of achievement, and certificate for participation in tank gunnery competition lacked legal efficacy); United States v. Smith, ACMR 8702513 (A.C.M.R. 29 June 1988) (unpub.) (application forms for Armed Forces Identification Cards lacked legal efficacy).

[98] *Hopwood*, 30 M.J. at 147.

[99] *Id.* at 148.

[100] *Id.*

[101] 29 M.J. 530 (A.F.C.M.R. 1989).

[102] *Id.* at 532. For a discussion of *Hopwood* which construes the Air Force court's opinion as applying a relative standard for legal efficacy, see TJAGSA Practice Note, *Legal Efficacy as a Relative Concept*, The Army Lawyer, Jan. 1990, at 34.

[103] The court wrote:

> We are convinced that the application was effectively an instrument which perfected the appellant's claim to benefits. It is immaterial that additional steps may have been needed before legal harm actually occurred. In sum, the evidence shows that the information contained in the application substantiated and generated the loan and materially helped put the appellant into the new automobile he desired.

Id. at 533 (citations omitted). The government argued similarly before the Court of Military Appeals that the credit application had "legal efficacy in light of 'extrinsic facts'—namely, that the credit application was part of a set of documents which the automobile dealer used in the regular course of his business of selling cars." *Hopwood*, 30 M.J. at 147.

[104] *Hopwood*, 30 M.J. at 148.

[105] *Id.* The court distinguished the situation in *Hopwood* from that where an accused falsely writes the signature of another on a retail installment contract, as such a document would, if genuine, impose legal liabilities. *Id.* at 147 n.2.

[106] Indeed, this fact was recognized by the Court of Military Appeals in *Thomas*. 25 M.J. at 402 (merely because the accused is not guilty of forgery because the subject document lacked legal efficacy does "not ... suggest that [the accused] committed no crime or that the Government is without legal recourse to punish the misconduct").

[107] Violations of UCMJ art. 121.

[108] Violations of UCMJ art. 80; *see generally* United States v. Powell, 24 M.J. 603 (A.F.C.M.R. 1987)..

[109] Of course, incorporation and assimilation raise a potential issue of preemption. *See generally* TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66, 68-69.

[110] *Hopwood*, 30 M.J. at 148.

in a forgery charge actually has legal efficacy. Trial counsel should also consider whether alternative charging is necessary and appropriate to reach those situations where legal efficacy cannot be established for a document that is falsely made, altered, or uttered. Depending upon the trial counsel's theory of prosecution, the defense may respond that the statute charged under article 134 is preempted by article 123 or another punitive article of the UCMJ. As *Hopwood* and other forgery cases illustrate, prosecuting or defending a forgery case can be a professionally challenging and complex undertaking. MAJ Milhizer.

Contract Law Note

In a recently decided case, the Air Force placed no orders for computer hardware and computer-related services under a contractor's requirements contract. During the life of the contract, the Air Force arranged to purchase the same equipment from the contractor's supplier at the same price that had been offered to the contractor. The appellant contractor sought recovery from the Armed Services Board of Contract Appeals (ASBCA) for breach of contract on the basis that the government did not place orders for its requirements with appellant because the agency involved preferred to place its order with a large business.[111]

The Air Force entered into a one-year time and materials requirements type contract with Systems Architects, Inc., (SAI) through the Small Business Administration (SBA). SAI was a socially and economically disadvantaged 8(a) company. The contract envisioned purchase and installation of fifty-three computer systems over the life of the contract; the initial order was to have been for seven computer systems. The contract included options for five years, and the parties anticipated orders throughout the six-year period. The contracting officer stated that "the only problem which could preclude the exercise of an option was the unavailability of funds."

Pursuant to the contract, SAI developed a request for proposals for computer systems. The Air Force had reserved the right to approve the contractor's supplier. SAI and the Air Force ultimately decided to acquire the computers from Digital Equipment Corporation (DEC), with which SAI negotiated prices.

After SAI completed its purchase arrangements with DEC, and while the base year of the SAI-Air Force contract still had more than four months to run, the Air Force began direct negotiations with DEC to buy the computers for the same price that SAI had negotiated. Despite intervention by the SBA and the fact that requirements for the systems existed during the term of SAI's requirements contract, the Air Force did not issue any delivery orders against that contract. After SAI's contract expired without exercise of the first option period by the government, the Air Force purchased the computer systems directly from DEC. SAI then filed claims based on the diversion of the computer hardware purchases and cancellation of some related site modification work.

Deciding the case under ASBCA Rule 11 without a hearing, the board first held that SAI could not recover for work to be done during the option years because the clear language of the option reservation in the contract established that the contract did not constitute a multi-year type contract.

The board viewed two of the agency's assertions—that all requirements existed as of the signing of the agreement and that award was not being made immediately for all requirements only because of budgetary restrictions—as coming "close to baiting a trap to ensnare bidders into believing that a long term contract is a fait accompli but for Government red tape." The board then concluded that the Air Force did in fact have requirements for which funds were available during the base year of the contract with the appellant. Finally, the board considered that the contractor and its president had been convicted of felony convictions. On the basis of carefully considered evidence, the board found that those factors did not constitute reason for the government to avoid its contractual responsibilities to SAI. On these bases, the ASBCA decided that SAI was entitled to recovery of termination costs under the Termination for Convenience clause of the contract.

One issue remained for the board to decide. Should the facts of this case be considered to constitute a constructive termination for convenience, for which a contractor cannot recover lost profits, but only termination costs? Or do these facts constitute a wrongful termination for convenience for which SAI would be entitled to breach of contract damages, which includes recovery of anticipatory profits under the line of cases headed by *Torncello v. United States*?[112]

The board found that this case fell under the "Reiner Rule,"[113] under which a wrongful action by the government that prevents a contractor from performing its contract constitutes a termination for convenience. The "Reiner Rule" is not applicable in some circumstances, such as when the government is not acting in good faith. Although the board found that there was some evidence of bad faith on the part of the government agency in this case, the board held that the evidence did not meet the "well nigh irrefragable proof" standard required for such evidence by *Kalvar Corp. v. United States*.[114] In

[111] Systems Architects, Inc., ASBCA Nos. 28861, 27456 (10 Apr. 1990).

[112] 231 Ct. Cl. 20, 681 F.2d 756 (1982).

[113] John Reiner & Co. v. U.S., 163 Ct. Cl. 381, 325 F.2d 438 (1963), cert. denied, 377 U.S. 931 (1964).

[114] 211 Ct. Cl. 192, 198-199, 543 F.2d 1298, 1302 (1976)

addition, there was insufficient evidence to show that the government had in mind to terminate the contract in order to obtain a better price from another source from the outset, as occurred in *Torncello*.[115] Consequently, the board limited the contractor's recovery to that provided by the contract's Termination for Convenience clause.

Systems Architects, Inc. offers a couple of lessons to government contract lawyers and contracting officers. First, government agencies should issue orders to responsible holders of requirements contracts when those requirements actually exist during the term of the contract, when funding for the requirements is available, and when there is no legitimate reason to withhold the orders. That is to say, the government should abide by the terms of its own requirements contracts.

Second, in terms of contract formation, agencies should avoid giving contractors the impression that options will definitely be exercised as long as funds become available, if other considerations such as availability from alternate sources will be taken into account in determining whether to exercise the options. Such impressions and the expectations that arise therefrom on the part of a contractor may well produce motivation for the contractor to challenge even reasonable and well-founded determinations by government officials not to exercise contract options. MAJ Murphy and CPT Howlett.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Estate Planning Note

Illegitimate Child Not Entitled to SGLI Proceeds

A United States district court has held that an illegitimate child is not entitled to Servicemen's Group Life Insurance (SGLI) proceeds. The decision in *Prudential Ins. Co. v. Moorehead*,[116] however, should be limited to a narrow range of cases involving illegitimate children.

William Moorehead died as a result of a motorcycle accident while he was on active duty with the Navy. He was insured under the SGLI program, but had not designated a beneficiary for the policy. He was not married and left surviving parents. A New York court issued a posthumous judicial decree that Moorehead was the father of an illegitimate child. Moorehead had never acknowledged paternity of the child.

Morehead's parents and the mother of the child both claimed the right to receive the SGLI proceeds. The defendant insurer filed an interpleader action to determine which of the claimants was entitled to the proceeds.

The court held that Morehead's parents were the rightful recipients. Under federal law, if no beneficiary is designated, SGLI proceeds will be paid to a surviving spouse, then to children and, if none, to surviving parents.[117] Illegitimate children are entitled to recover proceeds only if one of five conditions has been met: 1) the insured acknowledged the child in writing; 2) the insured is judicially ordered to contribute support for the child; 3) the insured has, before his death, been judicially declared to be the father of the child; 4) the insured named himself as the father of the child in the birth certificate; or 5) proof of paternity is established from service department or public records showing that the insured was named as the father of the child.[118]

The mother of the illegitimate child argued that the court was collaterally estopped from denying the validity of the New York decree. The court noted, however, that the statutory prerequisites were not fulfilled even if the decree was valid.

In a separately issued opinion,[119] the court rejected the mother's contention that federal law violated the equal protection clause of the fifth amendment by treating posthumous children of insured servicemen differently than similarly situated legitimate children. The court found that congressional policy behind the law was to provide uniformity in the disposition of SGLI proceeds, lend accuracy to the proof of paternity, and deter spurious claims. According to the court, the classification in the law is substantially related to these important governmental objectives. MAJ Ingold.

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[115]For another recent discussion (in dicta) of the bad faith issue, see SMS Data Products Group, Inc. v. United States, 19 Cl. Ct. 612 (1990).

[116]730 F. Supp. 731 (M.D. La. 1990).

[117]38 U.S.C. § 770 (1982).

[118]38 U.S.C. § 765(8) (1982).

[119]*See* The Prudential Insurance Company of America v. Morehead, 730 F. Supp. 727 (M.D. La. 1989).

Tax Notes

Tax Consequences of Selling the Principal Residence Upon Divorce

Couples undergoing divorce generally choose one of three alternatives to address the principal residence in the property settlement. Each of these options has tax consequences that must be carefully considered by the divorcing couple. The most straightforward option is to sell the home immediately and divide the proceeds. Another option is for one of the parties to continue to own the home and pay off the other spouse's interest in the home. The final alternative is for the parties to continue to own the home and allow one of the parties to continue to live in the home with plans to sell the home in the future. Attorneys assisting divorcing couples in the preparation of property settlement agreements must be able to explain the tax implications of each of these alternatives.

Sale Prior to Divorce

A very simple arrangement chosen by some divorcing couples—selling the marital home and splitting the proceeds before the divorce—has potentially complex tax implications. The Internal Revenue Service (IRS) will require each party to report his or her share of the gain from the sale unless they qualify for tax deferral under section 1034.[120] Under 1034, tax on the gain realized upon the sale of a principal residence will be deferred if another home is purchased within the statutory replacement period.[121] The replacement period for active duty members begins two years before and ends four years after the sale of a principal residence.[122] Those not serving on active duty have only two years after the sale of a principal residence to purchase a replacement home. To qualify for deferral, the cost of the replacement home must exceed the adjusted sales cost of the former home.

Each spouse must separately satisfy the requirements of section 1034 with respect to reporting his or her gain to the IRS.[123] Thus, if only one spouse purchases a replacement residence, only that spouse's share of the sales proceeds qualifies for nonrecognition of gain under section 1034. One planning strategy to consider when only one spouse intends to purchase a replacement residence is to make a presale transfer of the home to the spouse intending to buy another home. In this way, the spouse who did not intend to buy a new home would not realize any gain and the other spouse could use section 1034 to defer recognition of the gain.

If each spouse intends to purchase a replacement residence, they should report the details of the sale of the former residence on Form 2119 and inform the IRS that they intend to buy another home. An amended return must be filed, however, if either spouse fails to purchase a replacement home. Spouses can avoid joint liability if a separate return was filed for the year the former home was sold. If a joint return was filed, however, both spouses are jointly and severally liable for tax on the gain realized on the sale.[124] Thus, a spouse may be liable for paying taxes attributable to the other spouse's interest in the home. The parties may not file an amended return to switch their filing status from married filing jointly to married filing separately.[125]

Attorneys should also consider the potential application of section 121 of the code if the parties to the divorce have reached age 55.[126] Under section 121, taxpayers can exclude up to $125,000 from the gain realized on the sale of a principal residence if they are 55 or older and occupied the home for three out of the five years preceding the sale.[127] If a married couple sells a home, only one of the spouses must be 55. If a married couple files a separate return, the exclusion is limited to $62,500.

The election to use section 121 may be made only once during a lifetime. Married couples must join in the election to use 121.[128] If the election is made, it forever bars both spouses from using section 121 again. Moreover, if a spouse remarries, the new spouse will not be allowed to use section 121.[129]

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[120] I.R.C. § 1034 (West Supp. 1989).

[121] *Id.*

[122] *Id.*

[123] Both spouses may be able to defer gain realized on the sale of the marital home if they each purchase a separate new principal residence. Rev. Rul. 74-250, 1974-1 C.B. 202.

[124] I.R.C. § 6013(d)(3) (West Supp. 1989). Section 6013(e) of the code provides a limited measure of relief to an innocent spouse from liability for tax.

[125] Treas. Reg. 1.6013-1(a)(1) provides that a taxpayer may not use an amended return to file differently from the original return.

[126] The impact of section 121 on the sale of a home involving divorcing spouses is more fully explored in Emory, Meade, *Divorce May Cause Only Half Gain To Qualify for § 121*, Journal of Taxation, September 1982, at 182.

[127] I.R.C. § 121 (West Supp. 1989).

[128] I.R.C. § 121(c) (West Supp. 1989). A joint election is required even if the spouses file separate returns.

[129] Treas. Reg. 1.121-2(b)(2), ex. 2.

Married taxpayers may avoid the taint problem by postponing the sale until after the divorce. An election by either spouse after the divorce will not taint the other spouse because divorced spouses are considered separate taxpayers by the IRS.[130] Thus, divorcing couples may each be entitled to a $125,000 exclusion simply by waiting until after the divorce to sell the principal residence. Divorcing couples with homes that have appreciated considerably may increase tax savings further by using section 1034 in addition to section 121. To the extent that section 121 applies in conjunction with section 1034, the amount of gain excluded under section 121 reduces the sales price of former home.

Transfer of Interest to Spouse

Some divorcing couples may obtain favorable tax consequences by transferring ownership of the home prior to a divorce. Under a 1984 change to the code, transfers between spouses prior to divorce are treated as nontaxable gifts.[131] This tax treatment under section 1041 of the code is mandatory.

Section 1041 applies not only to transfers between spouses but also to transfers incident to a divorce. Property is considered transferred incident to a divorce if the transfer is made within one year of the divorce or if the transfer is within six years of the divorce and required under provisions of the divorce decree or separation agreement.[132]

There is no recognition of gain or loss upon the transfer of a home to a spouse even if the transferee spouse pays consideration for the home or assumes liability. Thus, if the wife pays the husband cash for his one-half interest in the property, she may not add the cash payment to her basis in the property. The husband would not report the cash received as gain realized. If the wife does not have sufficient funds to pay off her husband in cash, she may sign a promissory note to finance the transaction. The drawback in this arrangement from the wife's perspective is that the interest paid on the note would not qualify as home mortgage interest.[133] The husband, on the other hand, should report any interest received on the note on his federal tax return.

The transferee spouse will assume the transferor's basis in the property. The spouse who winds up with the home therefore will be liable for tax on the entire appreciated gain. This eventual tax liability should be taken into account when the parties are determining the value of the property.

Despite the potential liability for tax on gain realized upon the sale of the home, substantial tax advantages will be conferred on the party who retains the marital home. The spouse who occupies the marital home may be able to deduct real estate taxes and the interest portion of monthly mortgage payments. Moreover, the occupying spouse may be able to defer or exclude gain realized on the eventual sale of the residence by meeting the requirements of section 1034 or section 121.

Continuance of Joint Ownership After Divorce

A fairly typical arrangement, especially for couples with children, is to continue to own a home jointly for several years after a divorce with an agreement to sell the home at some future point. Most couples agree that any gain realized upon the eventual sale will be shared equally.

The disadvantage of this arrangement is that the spouse who moved out of the home would not be eligible for the relief provisions of either section 121 or 1034, because the home would no longer qualify as a principal residence.[134] Accordingly, the vacating spouse may have to report the entire amount of his or her share of the gain. The spouse who continues to occupy the residence after the divorce, on the other hand, may be able to use either section 121 or 1034, or both, to minimize tax liability. To obtain a fair result, the parties should include a provision in their settlement agreement to share the after-tax settlement proceeds.

In *Young v. Commissioner*[135] a husband moved out of a jointly owned home and sold the home over one year later to his wife. After another year, the husband purchased a replacement home. The Tax Court ruled that the husband could not use section 1034 to defer gain on the sale of the former home. According to the court, a taxpayer must be using the old home as a principal residence at the time it is being sold to qualify for nonrecognition treatment under section 1034.

At least one commentator[136] believes that the *Young* decision is questionable in light of the subsequently

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[130] I.R.C. § 121(d)(6)(A) (West Supp. 1990). The couple must not merely be separated.

[131] I.R.C. § 1041 (West Supp. 1989).

[132] I.R.C. § 1041(C)(1) and (2) (West Supp. 1990).

[133] I.R.C. § 163(h)(3)(B)(i)(II) requires that the note must be secured by the principal residence before interest payments are deductible as home mortgage interest. The interest will, however, be partially deductible as personal interest. The deduction for personal interest is limited to 10% in 1990 and will be completely phased out by 1991.

[134] Sections 121 and 1034 both require that the selling taxpayer use the home as a principal residence. The use of the residence by a spouse cannot be imputed to the other spouse.

[135] 49 T.C.M. 1002 (1985).

[136] Hesch, *Divorce and the Personal Residence: An Analysis of The Tax Consequences*,, 16 Family Law Reporter 3017, 3024 (Feb. 1990).

issued decision in *Bolaris v. Commissioner.*[137] In *Bolaris* the 9th Circuit held that property converted to a rental prior to sale remained eligible for nonrecognition treatment under section 1034 even though the taxpayer deducted a net loss of the rental activity. The court intimated that an owner of a converted residence would retain eligibility under section 1034 if the home is sold within two years after it was abandoned as a principal residence.

Divorcing taxpayers may be able to rely on *Bolaris* if the home is actually sold within a short time after one of the spouses has moved out. Tax deferral under section 1034 does not require actual occupancy of the former home at the time of sale. Thus, a spouse who moves out of his principal residence may qualify if he or she sells their interest in the home within two years from the date he moves out. Tax planners should warn divorcing couples, however, that this approach has not yet been specifically approved by the IRS or the Tax Court.

Conclusion

The tax consequences of selling or transferring the marital home upon divorce should be fully explored before entering into a property settlement agreement. Attorneys must be able to anticipate proposals that have negative tax implications for their clients. Most proposals with tax disadvantages to one of the parties can be neutralized by including appropriate provisions in the property settlement agreement.

Domestic relations attorneys should also carefully evaluate proposals involving sale of the marital home in light of the potential application of sections 1034 and 121. To the extent possible, the parties should agree to a solution that maximizes the tax benefits available under these sections of the code. MAJ Ingold.

Agent Orange Settlement Payments Are Tax-Free

The IRS has publicly released a private letter ruling containing good news for American Vietnam war veterans.[138] The ruling concludes that payments to veterans from the Agent Orange Settlement Fund are not subject to federal income tax because the payments constitute damages for personal injury or sickness. Survivors receiving payments from the fund are also entitled to exclude payments from federal income tax.

The tax treatment announced in the ruling applies only to the Agent Orange Settlement Fund created in 1989. It is estimated that 60,000 people are eligible for payments from the fund because of sickness or disability from exposure to Agent Orange during duty in Vietnam. The IRS ruling clarifies that income realized from the investment of the settlement fund's assets is not taxable income to either the fund or recipients of fund proceeds. MAJ Ingold.

Professional Responsibility Note

New York Amends Ethics Rules

New York adopted a revised version of the Code of Professional Responsibility to go into effect on 1 September 1990.[139] New York decided to update its existing code rather than adopt the ABA Model Rules, which are now in effect in thirty-two other states.[140]

In some areas, the revised New York rules reflect the substance of some of the Model Rules. For example, New York adopted a new rule[141] that imposes responsibility of supervisory attorneys who order an ethical violation or who fail to take remedial action to mitigate misconduct of a subordinate if the supervisor knows or should have known of the misconduct. Model Rule 5.1[142] imposes imputed responsibility on supervisors under similar circumstances.

The revised New York Code is also consistent with the ABA Model Rules in the area of reporting misconduct of other attorneys. The new standard requires reporting if the conduct raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness to practice.[143] There is no duty to report information concerning misconduct if it is protected as a confidence or secret under the amended New York rule.

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[137] 776 F.2d 1426 (9th Cir. 1985), *rev'g* 81 T.C. 840 (1983).

[138] IR-90-79 (May 16, 1990).

[139] 8 Law. Man. Prof. Conduct 172.

[140] A listing of all of the states that have adopted some version of the ABA Model Rules may be found in TJAGSA Practice Note, *South Carolina Adopts New Ethics Rules*, The Army Lawyer, Apr. 1990, at 77.

[141] New York DR 1-104(A).

[142] ABA Model Rules of Professional Conduct [hereinafter Model Rules].

[143] A list of the states that have adopted some version of the ABA rules may be found in TJAGSA Practice Note, *South Carolina Adopts New Ethics Rules*, The Army Lawyer, Apr. 1990, at 77.

A new rule was added to the New York Code to clarify that an attorney representing an entity such as a corporation has an obligation to inform constituents that they represent the organization whenever the organization's interest appear to be different from the constituents'. This requirement is similar to the one contained in ABA Model Rule 1.13.

Several New York rules are different from the ABA Model Rules. New York DR 1-102(A)(6), for example, notes that attorneys should not "[u]nlawfully discriminate in the practice of law, including hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, or marital status." This anti-discriminatory standard is not contained in the ABA Model Rules.

New York's amended rules also differ from the Model Rules in the area of client confidentiality. New York DR 4-101 retains most of the Model Code provisions relating to client confidentiality, including the discretion to release information necessary to prevent a client from committing a future crime. The revised New York rule, however, adds that a lawyer may reveal confidential information to withdraw a written or oral communication made by the attorney that the lawyer has discovered was based on materially inaccurate information or that is being used to further a crime or a fraud.

New York's updated version of the Model Code contains significant new provisions on several other topics, such as lawyer advertising and solicitation, trial publicity, and contingent fees. Judge advocates licensed in New York state are required to follow the new ethics standards to the extent that they are not inconsistent with the Army Rules of Professional Conduct for Lawyers.[144] MAJ Ingold.

Consumer Law Notes

Tax Refund Interception in Satisfaction of Defaulted Student Loans: Statute of Limitations for Legal Enforcement is Ten Years

As part of the Debt Collection Act of 1982,[145] Congress amended the six-year statute of limitations for government claims. As a result of these amendments, government agencies now have authority to take administrative action to satisfy debts up to ten years after a claim accrues.[146] Although the six-year statute of limitations continues to limit the judicial enforceability of a debt through litigation, legal enforcement through administrative offset is permissible until ten years after accrual.

In 1984, Congress enabled any federal agency to collect past due debts through Internal Revenue Service (IRS) setoff of federal income tax refunds.[147] Since 1984, the Department of Education (DOE) has used tax refund setoff frequently in seeking satisfaction of debts from defaulted student loans.

A recent case illustrates the aggressive approach DOE uses to obtain payment of defaulted student loans. In *Jones v. Cavazos*[148] Coahome Junior College in Clarksdale, Mississippi, provided Adeline Jones with a National Direct Student Loan in the early 1970's. In 1974, the college placed the loan in default. Twelve years later, in 1986, the college assigned the loan to DOE. The following year, DOE notified Jones that if she did not repay the loan, her income tax refund would be subject to offset.

Subsequently, Jones sued the Secretary of Education, seeking an injunction of the offset and a judicial declaration that the proposed offset violated her due process rights because she had inadequate notice of possible defenses and had not received a hearing. The Eleventh Circuit held that Jones had no standing to raise the due process issue because she had earlier waived this right. The 1987 DOE notice had informed her of her right to an oral hearing,[149] but she had failed to request one.

The failure to apprise her of available defenses was also addressed by the court. The only defense that Jones argued should have been in the notice was the statute of limitations. The court concluded that DOE's failure to provide this notice could not have injured Jones because the statute of limitations had not yet run. The *Jones v. Cavazos* court followed the majority trend on this issue. It held that DOE's claim against Jones did not accrue until the college assigned the debt to DOE, in this case, in

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[144] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, Rule 8.5 comment (31 Dec. 1987).

[145] Pub. L. No. 97-365, 96 Stat. 1749 (1982) (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., and 31 U.S.C.).

[146] 31 U.S.C. § 3716(c) (1982).

[147] 31 U.S.C. § 3720A (Supp. V 1987).

[148] 889 F.2d 1043 (11th Cir. 1989).

[149] 32 C.F.R. § 90.6N.4 (1988).

1986. As a result, IRS offset of her tax refund would be lawful.

For subjects of setoff actions, the issue most often in contention is when their debts became delinquent for purposes of tax refund offset. *Jones v. Cavazos* reflects the majority view in this area. Most courts hold that both the six-year statute of limitations for judicial enforcement and the ten-year statute of limitations for setoff action accrue when a delinquent debt is assigned to a federal agency.[150] Obviously, a significant period of time may elapse between the time of default and the time a college or institution assigns a debt to a federal agency. The *Jones v. Cavazos* case is a good example of how such a delay may not be the source of relief for a debtor.

Debtors with defaulted student loans are prime candidates for income tax refund offset. This is particularly true of military legal assistance clients. Because of centralized pay accounting, creditor federal agencies such as DOE should have little trouble locating soldiers and providing the requisite notice before beginning offset action. Even if such a debt is fifteen years past default, if DOE received assignment of the debt within ten years, offset is a threat that is both likely and legitimate. Legal assistance attorneys should advise their clients accordingly and assist them in negotiating repayment schedules whenever possible. MAJ Pottorff.

General Development Corporation Enters Plea Agreement

In a matter of current interest to many legal assistance attorneys on the east coast and in the southeastern United States, the United States Attorney for the Southern District of Florida recently reached an agreement with General Development Corporation (GDC).[151] The U.S. Attorney's office reported that GDC, a Florida real estate corporation, pleaded guilty to conspiracy to commit mail fraud and interstate transport of persons in furtherance of a fraud. GDC has agreed to enter a consent decree requiring remedial actions and restitution to the victims. Home buyers who purchased homes from GDC from 1 January 1983, through 1 January 1990, will receive the difference between the actual fair market value of their homes and the inflated purchase price they paid to GDC.

According to the indictment, GDC was misrepresenting the price of up to 10,000 homes sold to purchasers. Many of these buyers were from out of state and many were military members. Because they were unfamiliar with the Florida real estate market and because GDC carefully controlled the information disclosed to the buyers, prices remained artificially high. GDC had its own mortgage company, GDV Financial, which used appraisals inflated to conceal the overpricing. Because many of the buyers chose to rent out these Florida homes until retirement, they were delayed in discovering the deception. In fact, GDC's customer service office tried to mislead buyers who subsequently questioned the prices they had paid. The customer service office would explain the discrepancy in value as the result of a slump in the housing market. Some buyers did not realize until several years later that their homes were actually worth much less than they had paid.

Following its agreement to enter the guilty plea, GDC filed for bankruptcy. The bankruptcy action is pending, and because of the bankruptcy, sentencing in the case was also postponed. A special master is presently reviewing and evaluating a restitution plan for GDC. Once the special master has completed this process and the other pending issues are resolved, another special master will evaluate and notify individuals of eligibility requirements for seeking restitution. MAJ Pottorff.

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[150] *See, e.g.*, Thomas v. Bennett, 856 F.2d 1165 (8th Cir. 1988); Hurst v. United States, 695 F. Supp. 1137 (D. Kan. 1988); Gerrard v. United States, 656 F. Supp. 570 (N.D. Cal. 1987).

[151] This information was provided by CPT Andrew Ivchenko, OSJA, Aberdeen Proving Ground, Maryland.

Claims Report

United States Army Claims Service

The Model Claims Office Program

Colonel Jack F. Lane, Jr.
Commander, US Army Claims Service

TJAG Policy Memorandum 89-5, subject: Model Claims Office Program, dated 10 October 1989, was published in the November 1989 issue of *The Army Lawyer*. Copies of this memorandum were provided with the Model Claims Office packet to the appropriate offices in CONUS and OCONUS in October 1989. This article will provide guidance on how the heads of claims offices should use this program. Additionally, it will furnish some answers to questions that have been raised since the packet was distributed.

First, it must be understood that this is a test program for FY90 and FY91. This approach was adopted in the

belief that a test period would help achieve a positive transition into this program and ensure that the standards provided the right type of evaluation. Accordingly, the heads of claims offices should provide USARCS with any criticisms they have of the standards when they submit their reports in November 1990. Second, this set of standards replaces those previously published in TJAG Policy Letters and Memorandums (see Claims Report in the December 1989 issue of *The Army Lawyer*). Third, the program is designed to be a management tool for the head of a claims office, to assist in his or her responsibility of providing oversight and guidance to the claims judge advocate or claims attorney in the operation of the claims office. It provides a uniform standard Armywide for this assessment, but is not a competition between claims offices. Every office that meets the standards will be recognized.

Finally, the program is designed to require compliance with some basic, nondiscretionary standards for a claims office (termed "critical standards") and to provide other standards that an individual office should strive to meet. Meeting most but not all of these other standards will not necessarily keep an office from qualifying as a Model Claims Office. If, for example, an individual office does not have an NCO trained as an investigator because there are insufficient personnel to provide the claims office with an NCO, the office can still amass enough points through other standards to qualify.

One question that has been asked is when should the claims office be "graded" for this program. The basic objective is to have the head of the claims office, at a minimum, review the claims office operation once a year in October (looking back at the recently completed fiscal year). Obviously, a review of claims operations on a more frequent basis is desirable, but the program is based on activity in a given fiscal year. A number of the standards will require the claims office to maintain some records during the fiscal year in order to show their achievement of these standards. For example, standard 15 in section 1 (hereinafter, standards will be referred to by number only; i.e., 1-15) requires the claims judge advocate to keep a record throughout the year showing when he submitted his monthly CEA report.[1] Standard 1-4 is intended to mean that the proper claims references are on hand during the entire year; it would be of little use to have these references on 30 September only. Nevertheless, the head of the claims office does not have to check it every month either. He or she should periodically check to see that the claims office has what it needs and then check up when a need is identified to see that it is filled. Information on new publications is provided through various means, so keeping track should be easy. In other words, approach the standards with common sense and in the spirit that is intended; the standards are designed to help you run a good claims office.

Some people have asked if we are serious about a grading standard of "always." Does that mean that if you miss a day entering claims data (standard 2-3) you cannot get two points? Once again, one must consider this in the spirit of the program. Failing to enter claims data one day out of approximately 250 work days in a year is not intended to disqualify an office from receiving maximum points on that standard. "Always" should be interpreted to mean that the office is operating efficiently so that daily entry of data is a routine matter and only missed because of unusual circumstances. There is no magic number of misses, and we do not want offices spending all their time counting for a report card when they should be processing claims. "Usually" means that more often than not, data is entered on a daily basis. "No" means that more often than not, data is not entered daily.[2]

Some of the standards call for a subjective determination. For example, standards 1-1 through 1-2, address whether the claims office routinely operates in a certain manner so as to provide a claims operation that is responsive to the claimants. Standard 1-3 addresses normal office operations during the course of the year and should be graded based on spot-checking of office operations. The personnel in the claims office know how well they meet this standard without keeping detailed accounting records. The head of the claims office certifies on the cover sheet that normal practice in the office meets this standard.

Standard 1-5 can be met two ways. Either the claims judge advocate (CJA) in the position at the end of the fiscal year (whose name is entered in the space provided) has been in the position throughout the fiscal year (shown by date assigned), or the CJA named was assigned during the fiscal year, and his or her predecessor was in the position twelve or more months (shown on the 3d line). If the office does not have a CJA, but does have a claims attorney (a civilian, who is normally a long-term asset), then the standard is met if the person is certified per paragraph 1-6, AR 27-20.

Standard 1-9 concerns the duties of an NCO if one is actually assigned in the claims office. It has been suggested that "N/A" be authorized when no NCO is available. This change is unnecessary, however. The instructions accompanying the report form states (under the heading "Scoring") that where meeting a standard is beyond its control, the office may attach an explanation and adjustments may be made by USARCS or the command claims service.

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[1] Other standards of this type are 2-6, 2-7 and 2-8.

[2] Other standards of this type are 2-3, 2-4, 4-4b, 4-4c, 4-5, 5-3a, 5-4, 5-5 and 5-7.

Standard 1-10 is another standard that has to be looked at from an overall standpoint. Has the claims office had its full compliment of personnel for most of the year, or is it normally staffed at a bare operational level? When vacancies occur, does the office immediately seek replacements and work with the Civilian Personnel Office (CPO) to see that vacancies are announced as soon as possible and that recruitment pursued? It is understood that the SJA office is not always the master of its fate when dealing with CPO, but it can work to influence the CPO outcome.

Standard 2-2 looks at the computer literacy of a claims office. New personnel should be given a familiarization course on the program they will be working with (e.g., torts, personnel or affirmative claims), even if they are not going to be the primary data input personnel. This will enable them to locate and review given records and pass on new information to input personnel.

Standard 2-9 is geared to the use of the standard automation program provided by USARCS. Needless to say, heads of claims offices are free to use other types of reports and management data. However, printing the automated report should be done every month as a check on the database. The printed report should be provided to the SJA along with any other desired reports.

Standard 3-5 uses the word "timely"; this means that in most cases the DD Form 1840-R is dispatched to the carrier before the seventy-five day notice period expires. Obviously, if the claimant brings the form in after that time has passed, this will not count against the claims office. Again, look to see if recovery actions are being rejected in any number because of late notice. If they are, the office has a problem and is not meeting this standard.

Standard 3-7 is not intended to cause a review of every claim settled in the year. Rather, there should be a system in place for these actions and that system should be in use.

Standard 4-4b requires the head of the claims office to take time to review tort claims files periodically to see if they are being completely investigated. As most offices do not have too many of these (when compared to personnel claims), this is not an unreasonable burden. The required review may be done through claims forwarded for denial or final offer action (which cannot be delegated), or an occasional random sampling may be sufficient. The object is to stress professionalism in handling tort claims, thus protecting the Army's interests.

Standard 4-7 is similar to standard 1-9. The term "trained" means that the NCO has attended a workshop or other claims course that provided instruction in tort claims investigation. However, meaningful on the job training may be sufficient. The point is that most NCOs will not come to the claims office with any experience of training in tort investigation, and some training effort must be undertaken.

The bottom line is that these standards are a management tool for the head of the claims office to use on a continuing basis to evaluate the claims office to ensure it is meeting the objectives set forth in AR 27-20. It requires some judgment calls and an honest approach to the appraisal process. Offices should be working to live up to the spirit of these standards, not simply performing "bean-counting" exercises. The test period provides us all with an opportunity to evaluate the usefulness of the Model Claims Office Program, and feedback from the field is expected and encouraged. In the long run, we hope to see a better claims system Armywide.

A Quick Guide to Adjudicating Personnel Claims

Robert A. Frezza
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In fiscal year 1989, U.S. Army claims offices adjudicated over 91,000 personnel claims. Over 65,000 of these claims were for property damaged or lost during government-sponsored shipment. None of these claims involved million dollar personal injuries. Instead, they involved determining the appropriate payment on hundreds of thousands of fifty dollar and hundred dollar line items, which is the claims examiner's task. It is an important task. An overwhelming proportion of a claims office's workload consists of personnel claims. Providing competent personnel claims assistance is one very important way of helping good soldiers.

In working a personnel claim, there are two key questions the claims examiner must continually ask: 1) whether the claimant has substantiated that a particular item he or she owned was damaged or lost in shipment; and 2) whether the claimant has substantiated the value of that damage or loss.

Paragraph 2-41, DA Pam 27-162, addresses substantiation in detail. It does not obviate the need for good judgment. Obviously, a claims examiner cannot require purchase receipts, estimates, and affidavits from disinterested parties to fully substantiate every item. This would impose an unnecessary hardship on soldiers and subvert the intended purpose of the Personnel Claims Act. On the other hand, a claims examiner who accepts every claim uncritically or attempts to mechanically apply guidance without thought does a grave disservice to honest claimants. Thoughtless processing of claims gives critics in the carrier industry ammunition to use both in evading liability and in attempting to eliminate the program altogether.

In adjudicating claims, there is a constant tension between asking for too little substantiation, which

destroys effective carrier recovery and encourages fraudulent claims, and asking for too much, which discourages honest claimants from filing claims and pulls soldiers away from their military duties unnecessarily. In a real sense, adjudicating large numbers of claims requires triage: the examiner must wisely allocate his or her time to ensure that the claims and line items most likely to result in erroneous payments receive the most attention.

Effective adjudicators focus on claimants who lack credibility and on questionable line items. They carefully examine big-ticket items and "look behind" the piece of paper submitted, rather than driving claimants to distraction by demanding a piece of paper for each and every twenty dollar item. An examiner's time is valuable, and it should be spent talking to claimants and repair firms, and capturing this information on the chronology sheet or in a memorandum for record to support a decision to pay the claimant or assert recovery.

Unusually expensive missing items should be a magnet for attention, particularly when the quantities or the values claimed are eye-catching in view of the claimant's age, grade, and family situation. Is the item listed on the inventory and is the description sufficiently specific? Did the claimant list the item as missing on the DD Form 1840 at delivery? Can the claimant provide a purchase receipt or an appraisal made prior to shipment? If not, the claimant may not have substantiated that he even owned the item, much less substantiated a value for it. A replacement cost estimate for a missing item relies totally on the claimant's assertion that the replacement item is substantially similar to the missing item. A statement from a friend or relative adds little.

Spot-checking helps resolve the examiner's dilemma. Questioning a friend who provided a statement, or contacting a store where the claimant recently purchased a valuable item may be sufficient to establish the claimant's honesty. If, on the other hand, the claimant is caught in a misstatement of fact, his credibility is diminished, and items that are not fully substantiated should be reduced substantially or disallowed altogether.

Similarly, exorbitant repair or replacement costs should be questioned. Did a firm familiar to the claims examiner provide the estimate? If not, the claimant should be directed to obtain a second estimate from a known firm. If the estimate lacks specificity, the repair firm should be contacted to provide details, particularly when the repair estimate may include repair of preexisting damage. The repair firm *must* be contacted prior to paying for internal damage. Claims examiners should never forget that a statement that an item is irreparably damaged from a firm that does not do repairs is worthless. Similarly, a simple statement on an estimate to the effect that "damage was due to shipment," proves nothing unless the repair firm can explain the basis for the statement.

Simple tests can give the claims examiner reason to focus on a claim. Were all the items purchased the month before pickup? Did the claimant list the make, model, and serial number, or merely put down "19-inch color T.V."? Are all the replacement costs for more expensive than average items? With unusual items and large claims, there is no substitute for personal inspection. Merely by looking at the kind of property a claimant has in his or her house, an experienced claims examiner can usually tell whether a claim is honest.

In all but the smallest offices, however, the claims examiner is only part of the claims team. For the claims examiner to adjudicate claims effectively, a number of other people have to perform their jobs well.

The receptionist who initially interviews claimants and takes in claims plays a crucial role in advising claimants on what prices to use and how to obtain substantiation. Although detailed claims packets are very helpful, a skilled receptionist can ease the burden on the claims examiner immeasurably in small ways, such as helping the claimant to describe items and explain damage on the DD Form 1844, List of Property and Claims Analysis Chart. Both the claims examiner and the claimant find it frustrating to have to track down additional substantiation when the receptionist's instructions are unclear. In many offices, unfortunately, this role is left to the least experienced person.

The carrier recovery specialist also has a part to play in the adjudication process. By constantly communicating his or her need for substantiation to the examiner, the recovery specialist can help the examiner focus on the total claims process and help maximize carrier recovery. Often, simply by asking the examiner, the recovery specialist can get the examiner to write a few notes on the chronology sheet, send a copy to the carrier, and then successfully pursue a demand.

The claims judge advocate (CJA) and staff judge advocate (SJA) also play critical roles in the adjudication process. Sadly, sometimes they play a negative role. If the CJA and SJA closely examine questionable payments and documents of dubious validity, their claims examiners will do so as well. If, on the other hand, the CJA and SJA ignore personnel claims, or if they force claims examiners to defend any decision not to pay by quoting chapter and verse from the regulation and then overrule them despite the published guidance or the weight of evidence, some claims examiners will perceive that the way to get by is to overpay claims, to the detriment of the claims system as a whole. The Army cannot afford this attitude if it intends to retain a gratuitous system for paying personnel claims into the next decade. The CJA is the manager of the SJA's claims office, and his or her claims examiner is supposed to be a well-trained professional who should be afforded some opportunity to exercise judgment and discretion.

The attitudes of the CJA and SJA towards claims training is also important. With new examiners, training is the only substitute for actual experience. Even very experienced personnel need refresher training to keep up with changes. If the SJA fails to support claims training or always sends the same people to training, the work product will obviously suffer.

A final word concerns courtesy. The claims system is intended to pay *meritorious* claims both promptly and fairly. Claims, however, is a service function; it is intended to provide a service to the soldier. Some claimants, in fact, would rather accept a small Loss of Value or Agreed Cost of Repair if it minimizes the amount of work they must do. A claims examiner must be flexible enough to work with soldiers and must treat honest claimants as human beings worthy of assistance and consideration.

A claimant who had his or her claim decided promptly and had the claims examiner explain in detail why the payment on line items could not be higher is far more likely to believe that the claims system is effective, even if he or she disagrees with the payment, than a claimant who was paid substantially more after an extended series of shouting matches. To the extent that the soldier does not perceive the treatment he or she received by the claims office as helpful, fair, and impartial, that office is not accomplishing its mission.

Adjudicating personnel claims is not a mechanical application of rules. It requires knowledge of local conditions and prices, and knowledge of people. It requires tact, judgment, and common sense. The proper adjudication of personnel claims is essential to holding down overall claims costs, maintaining morale, and effecting maximum carrier recovery.

Claims Notes

Claims Policy Note

Personnel Claims of NAFI Employees

This is a Claims Policy Note providing information on an exception to AR 27-20 affecting paragraph 12-7 of AR 27-20.

The Army Central Insurance Fund (ACIF), U.S. Army Community and Family Support Center, pays all Personnel Claims Act (Chapter 11) claims in excess of $100 filed by nonappropriated fund employees who are not AAFES employees. AR 27-20, paragraph 2-7*b*(3). ACIF desires to pursue carrier recovery on certain of these claims, but currently receives only a minimal file. AR 27-20, paragraph 2-7*a*.

Under the authority of AR 27-20, paragraph 1-9*e*, the Commander, USARCS, has approved an exception to the provisions of AR 27-20, paragraph 12-7*a*. Henceforth, when transmitting household goods shipment or hold baggage shipment claims to ACIF for payment, claims personnel will forward the entire claims file. The proper claims database transaction code remains "NF" (Forwarded to NAFI for payment. Claim closed). COL Lane.

Tort Claims Note

Preparation of the Medical Malpractice Case Abstract

The Health Care Quality Improvement Act of 1986, Public Law 99-660, mandated the establishment of a National Practitioner Data Bank (NPDB). Congress felt that the increasing occurrence of medical malpractice in the United States indicated a need to improve the quality of care by establishing a national database to retain information on the involvement of individual health care practitioners in malpractice incidents. The Department of Health and Human Services (DHHS) recently awarded a five year $15.9 million contract to Unisys Corporation to operate the data bank. DHHS has also published an implementing regulation (45 C.F.R. Part 60).

On 21 September 1987, DHHS and the Department of Defense (DOD) signed a Memorandum of Understanding (MOU) for DOD participation in the NPDB. The MOU provides that DOD shall report the name of a licensed health care provider whenever a medical malpractice claim is paid; a judgment is awarded; or a licensed health care provider's privileges are denied, limited, or revoked. It is important to note that a name must be provided when a claim has been paid or a judgment entered, even if no adverse action is taken pertaining to the practitioner's privileges. Additionally, DOD Directive 6025.13, DOD Medical Quality Assurance (November 17, 1988), requires that a report be prepared even if a claim is denied. The vehicle to be used for reporting information to the NPDB and to DOD is DD Form 2526R, Medical Malpractice Case Abstract.

When the case abstract is prepared is a matter of continuing misunderstanding. Army Regulation 27-20, paragraph 2-11.1(c) (28 Feb. 1990), provides guidance on the preparation of the medical malpractice case abstract. It requires CJAs/MCJAs to submit to USARCS a DD Form 2526R on all medical malpractice claims settled or denied by their respective claims offices or transferred to USARCS with a tort claims memorandum of opinion recommending payment or denial. The field claims office completes only blocks 1-4, 5a through 5d, and 6-8 on the front side of the form and writes the claimant's name and the claim number in the top margin of the form. These blocks cover claimant information, the diagnosis and procedure codes, and the basis of the claim. If the claim is within the field office's monetary authority and final action is taken, the field office will also complete as appropriate either block 5e (if the claim is denied) or

block 5f (if the claim is settled) and forward the abstract to USARCS for further processing.

USARCS forwards the completed abstract to the Quality Assurance Division, Office of the Surgeon General, for further processing. The abstract is subsequently returned by OTSG to the health care facility where the incident occurred for the completion of the back side of the form. The back side contains the professional review assessment and provider information.

The Army medical community is very concerned about the implementation of the NPDB and its potential impact on a health care practitioner's prospects for future civilian employment. The responsibility for providing names to the NPDB rests solely with the Surgeon General of the Army. Accordingly, CJAs/MCJAs should not be involved in completing the back side of the abstract. Similarly, they should not be involved in credentialing actions (see para. 6-3b, DA Pam. 27-162). An inquiry from a physician as to why he or she was named on the abstract should be referred through medical channels without an explanation being furnished by the CJA/MCJA. If an inquiry is made by an official from Health Services Command, the Office of the Surgeon General, or a similar headquarters, the inquirer should be referred to the Medical Malpractice Branch, Tort Claims Division, U.S. Army Claims Service.

The NPDB is now scheduled to be operational on October 1, 1990. It is important that CJAs/MCJAs understand the processing procedures for reports submitted by the Department of the Army. It is equally important that they also be sensitive to the concerns of the Army medical community about the implementation of the NPDB. Questions concerning the processing of case abstracts on claims that are finally acted on in the administrative stage may be directed to the Chief, Medical Malpractice Branch, Tort Claims Division, U.S. Army Claims Service. LTC Wagner.

Personnel Claims Recovery Note

When Carriers Fail to List Carton Size on the Inventory

Household goods carriers are required by their Tender of Service (DOD 4500.34R, Appendix A, paragraph 54c) to list the cubic size of cartons on the inventory they prepare. Very often, carriers violate this provision and fail to note any carton size on the inventory. Carton size is vital in assessing liability in non-increased released valuation claims, where the Joint Military-Industry Table of Weights is still in use and liability is based on the agreed weight of the packed carton.

When the carrier fails to list a carton size, claims personnel should assign a size to that carton based on the type of property it contained. For example, linens are often packed in 4.5 cubic foot cartons. An unmarked carton containing linens may be assigned a size of 4.5 cubic feet with a weight of thirty-five pounds.

Some carriers try to take advantage of their omissions by insisting that cartons without size be assigned on size of less than three cubic feet, with an agreed weight of twenty-five pounds and liability of only $15. This is, of course, the smallest size carton with the lowest liability. To defend their actions, they often misquote the Table of Weights.

The following is a suggested paragraph that may be used to rebut carriers who insist that cartons without cubic size listed on the inventory are only twenty-five pounds:

> Note 4 in the Joint Military-Industry Table of Weights states that "Cartons which are not identified as to size on the inventory, will be deemed to weigh at least 25 pounds. Weight assigned will be determined by the contents." The carton in question was assigned a weight and liability appropriate to its contents. Your offer of $15 is unacceptable.

Ms. Schultz.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office, and TJAGSA Administrative and Civil Law Division

Civilian Personnel Law

Estoppel

The U.S. Supreme Court has ruled that "[p]ayments of money from the Federal Treasury are limited to those authorized by statute, and that erroneous advice given by a Government employee to a benefit claimant cannot estop the Government from denying benefits not otherwise permitted by law." *Office of Personnel Management v. Charles Richmond,* 1990 WL 75263 (June 11, 1990).

Claimant sought advice from Navy employee relations personnel regarding the statutory limit on outside earnings that would disqualify him from continuing to receive a disability annuity. Because of his reliance on erroneous oral and written information, claimant earned more than the statutory limit, and OPM denied him benefits for six months. Claimant argued that the government was estopped from denying him disability payments because he was misinformed.

The Supreme Court disagreed with claimant's argument. They pointed out that the appropriations clause of the Constitution, art. I, § 9, cl. 7, provides that "money may be paid out only as authorized by statute. Thus, judicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized."

This narrow holding leaves open the question of whether the government can be estopped in non-money cases. Generally, our position should be that the government cannot be estopped.

Notification of MSPB Appeal Rights

MSPB found good cause for appellant's untimely filing of his petition for appeal in *Michaels v. USPS,* 44 M.S.P.R. 205 (1990). After an argument with his supervisor, appellant hastily submitted a resignation. When he attempted to withdraw the resignation the next day, the service refused to rescind it. He appealed, alleging that the resignation had been involuntary due to his emotional state at the time it was submitted. The appeal was dismissed because it was not filed within twenty days of the effective date of the action. The board reversed, holding that appellant's attempt to withdraw the resignation was notice of the claim to the agency. The USPS was therefore obliged under 5 C.F.R. § 1201.21 to notify him of his right to appeal an action to the MSPB. The board remanded for a hearing on the issue of involuntariness.

In a related issue, OPM's Petition to Reconsider the award of Joan Holzman was granted by the Arbitrator. *Department of the Army and American Federation of Government Employees, Local 900,* FMCS No. 89-00306 (June 6, 1990). OPM, dissatisfied with Holzman's award, initiated a Petition for Reconsideration. All parties were properly served within the thirty-day time limit except for the arbitrator himself. OPM blamed this mistake on "clerical error" and sent the arbitrator the petition two months past the due date. AFGE vigorously resisted, arguing that the time for petitioning had expired.

The arbitrator considered a recent Court of Appeals decision that held that the common law doctrine of *functus officio* does not apply to an arbitrator from whom OPM seeks reconsideration of an award. *Newman v. Corrado* 897 F.2d 1579 (Fed. Cir. 1990). The arbitrator held that "the statutorily prescribed reconsideration procedure is designed to curtail unnecessary appeals. That Congressional purpose should be honored and fostered even if the application is faulty in minor ways unless a party is prejudiced by doing so." FMC No. 89-00306 at 4.

The arbitrator stated that "[a] delay to consider OPM's arguments does not prejudice the Grievant or her representatives any more than any properly sought time-consuming procedure does. If my Award on the point was incorrect, they should not benefit from the mechanically deficient filing, especially as the Grievant and her representatives had notice of the attempt." FMC No. 89-00306 at 5.

Suspension Without Pay

The United States Court of Appeals affirmed a MSPB decision sustaining appellant's suspension without pay from the Navy. *Engdahl v. Department of the Navy,* 1990 WL 43633 (Fed. Cir.).

Appellant pleaded guilty to corruption of a minor, indecent assault, and endangering the welfare of a child. He also pleaded nolo contendere to indecent exposure, open lewdness, unlawful restraint, and two counts of simple assault. After confirming the pleas and after an investigative conference with appellant, the government issued a notice of proposed removal. Appellant was granted four extensions of time for his reply to that notice. Appellant argued that his suspension was violative of § 7501 of the Civil Service Reform Act of 1978 (the Act) and his fifth amendment due process rights.

Appellant claimed that the government suspended him to protect themselves from embarrassment. He argued that suspension for "protective" reasons was contrary to the Act, which allows suspension only for "disciplinary" reasons. The court affirmed the board's decision holding that Congress intended "disciplinary" to have a broader meaning than that suggested by appellant.

Based on *Matthews v. Eldridge,* 424 U.S. 319 (1976), the court held that appellant's fifth amendment procedural due process rights were not violated. They ruled that although appellant had interests that were substantially affected, the government's interests, i.e., safety for female co-workers and for naval base residents were far more substantial.

The court also found that the procedures followed before appellant was deprived of pay provided him sufficient opportunity to persuade the government that its concerns were mistaken. He had an opportunity to personally and/or in writing submit a reply disputing the grounds for suspension. He also personally met with government officials.

The court ruled that appellant's substantive due process rights were not violated. Appellant argued that his initial suspension without pay was too onerous because

there was only reasonable cause to believe that he had committed a crime prior to his guilty plea. In *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), the Supreme Court stated an employer can suspend someone with pay if he perceives a significant hazard in keeping the employee on the job. The court commented that the word "can" is descriptive, not normative. Thus, the government could suspend appellant with pay, but they are not required to.

Performance Improvement Period

In *Sullivan v. Department of the Navy,* 44 M.S.P.R. 646 (1990), the MSPB ruled that the agency must make clear the amount of time that an employee has to improve his performance. Appellant inferred from comments by the agency that he had thirty days to bring his performance up to an acceptable level. When the thirty days ended without further notice to him, he believed that he had met the requirements of his performance improvement period (PIP). He later found out that the PIP was ninety days. Appellant contested, and the board ruled that the burden of making clear the amount of time for the PIP is on the agency.

Appellant argued that only the PIP should be considered when evaluating his performance. The board held that Congress did not intend that performance during the PIP to be dispositive. Within certain limitations, post-PIP performance may be relied on to sustain a Chapter 43 action.

The court noted, "[t]he CSRA must be interpreted so as to give effect to Congress' expressed desire that the new statute serve the public's interest in seeing that employees who do not live up to the public trust can be efficiently removed." *See Lovshin v. Department of the Navy,* 767 F.2d 826, 841 (Fed. Cir. 1985).

Equal Employment Opportunity Law

Alcohol Accommodation

The U.S. Court of Appeals for the Fifth Circuit recently ruled that the 1973 Rehabilitation Act does not bar the Federal Bureau of Investigation from firing a special agent for repeated incidents of drunken misconduct. The FBI firing was permitted despite the agent's entry into a rehabilitation program and his continued recovery afterwards. *Butler v. Thornburgh,* 900 F.2d 871 (5th Cir. 1990).

Special Agent Butler was fired for his involvement in a number of alcohol-related incidents. While under the influence of alcohol, Butler provoked fights, drove his car into a wall, and forgot where he parked his FBI vehicle. After a series of probations, threats of dismissal, and repeated incidents, Butler checked himself into an inpatient program. Despite Butler's abstinence since his admission, the FBI let him go. Butler unsuccessfully challenged his dismissal in district court.

The FBI was successful in arguing that § 791(b) of the Rehabilitation Act did not apply to Butler. Section 791(b) prohibits basing an adverse action on disability when the individual can perform the essential functions of the job without endangering either his health and safety or that of others. The FBI showed that Butler's alcohol problem made it hard for him to perform his job without endangering either his health and safety or that of others around him.

The court held that a FBI agent "stands in the front line of law enforcement; and alcohol dependency would seriously compromise his ability to function and could well pose ... a threat to the safety of others." They stated, "whether or not Butler comes within the scope of the protections of the Rehabilitation Act, his position as a law enforcement officer means that his alcoholic incidents furnish a sufficient basis for his discharge because he cannot carry on his work safely."

Firm Choice

The EEOC overturned a MSPB decision upholding the removal of an employee for being AWOL and intoxicated while on the job. The employee was previously referred to counseling for similar alcohol-related misbehavior, but his efforts at rehabilitation were unsuccessful. The employee was terminated when his misconduct continued. The EEOC held that the employee was entitled to accommodation because he was an alcoholic. They ruled that the employee was not clearly informed that his continued misconduct would result in his removal. Because he was not clearly informed, he was not given a "firm choice" between successful rehabilitation or loss of employment.

The MSPB accepted the EEOC's findings. However, instead of a standard reinstatement-with-back-pay remedy, the MSPB ordered the agency to offer the appellant a vacant position only if he could show that he: 1) had completed his inpatient rehabilitation program; 2) was continuing with treatment; and 3) had continued to abstain from both alcohol and drugs. *Calton v. Army,* 44 M.S.P.R. 477 (1990).

Drug Addiction

The MSPB rejected an AJ's ruling that appellant's drug addiction was a handicapping condition requiring accommodation by the Navy. The MSPB followed *Brinkley v. VA,* 37 M.S.P.R. 682 (1988), requiring an appellant to show a direct causal relationship between the handicap of drug addiction and the misconduct at issue.

Appellant was removed after a gate search revealed three marijuana cigarette fragments in his ashtray. The

MSPB ruled that "possession of a drug, even one that an employee is addicted to, is not so intrinsic to drug addiction that, without more, a causal connection is established. Possession does not, *per se,* constitute misconduct which is entirely a manifestation of one's addiction."

Although the MSPB reversed the AJ's determination of accommodation, it mitigated the removal to a ninety-day suspension based on appellant's twelve years of service and his enrollment in a resident rehabilitation program. *Bolling v. Dep't of Navy*, 43 M.S.P.R. 668 (1990).

Sexual Harassment

The Assistant Secretary of Defense (FM&P) released the following definition of sexual harassment:

> Sexual harassment is a form of sex discrimination that includes unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or (3) such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.
>
> Any person in a supervisory or command position who uses or condones implicitly or explicitly sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

DOD emphasized that it remains DOD's firm policy that sexual harassment is unacceptable conduct and will not be condoned or tolerated in any way. This applies to both military and civilian personnel of the Department of Defense.

An important addition to this new definition is number (3), which establishes sexual harassment if the conduct, of a sexual nature, interferes with an individual's performance or creates an intimidating, hostile, or offensive environment. The provisions of the old definition are essentially incorporated into the new one.

Labor Law

Negotiability of Wages

The Supreme Court recently affirmed a decision requiring the Army to negotiate with unions over salary increases and fringe benefits at an Army section 6 school. *Fort Stewart Schools v. Federal Labor Relations Authority,* 58 USLW 4624 (May 29, 1990). This puts to rest the management argument that "conditions of employment" under 5 U.S.C. § 7101 do not include wages.

Fort Stewart Schools may have far ranging implications. For instance, apart and aside from the section 6 schools, nonappropriated fund instrumentalities may be subject to collective bargaining on wages and fringe benefits.

The Supreme Court decision undermines the budget argument. The government will need to demonstrate, through statistical analysis, how a union proposal either requires the creation of a particular program in the budget or that a proposal will result in a significant and unavoidable increase in costs not offset by compensating benefits. However, the Court's decision questions the propriety of the authority's inclusion of intangible benefits such as "increased morale" in the compensating benefits equation. Specifically, the Court noted: "it is difficult to see how the Authority could possibly derive a test measured by nonmonetary benefits from a provision that speaks only to the agency's authority ... to determine ... [its] budget." 58 USLW at 4627. With this in mind, when developing the management "strawman," labor attorneys should compile accurate and detailed budget calculations as to the effect of various changes in wages and/or benefits on the budget of the individual activity. Furthermore, the government should negotiate all pay and benefits changes at one time and agree to a "zipper" clause to prevent reopening of the agreement to discuss additional benefits or wages.

It should also be noted that under authority precedent, negotiability decisions (as opposed to ULP remedies) are to be applied prospectively, unless the parties subsequently agree to some sort of retroactive application. *AFGE Local 32 and OPM,* 26 FLRA 612 (1987). When the unions attempt to raise the issue of retroactive application, the government should not make any concessions in this area.

While pay bargaining is a new area of practice for labor relations specialists and labor counselors alike, DCSPER will offer advice and training courses for those faced with such negotiations. In addition, personnel will be available to assist on site with negotiations if requested. The DCSPER POC is David Helmer at AUTOVON 225-9863; DAJA-LE POC is Mike Meisel at AUTOVON 225-9300.

Negotiated Grievance Procedures

In *National Labor Relations Board Professional Association,* 35 FLRA No. 123 (1990), the FLRA reexamined it's position regarding adverse actions involving

nonpreference-eligible, excepted service employees. The FLRA now holds that these employees are precluded by law from challenging an adverse action set forth in 5 U.S.C. § 7512 or an action based on unacceptable performance set forth in 5 U.S.C. 4303(a) through the negotiated grievance procedure. The FLRA relied upon *HHS v. FLRA*, 858 F.2d 1278 (7th Cir. 1988); *Treasury v. FLRA*, 873 F.2d 1467 (D.C. Cir. 1989); *HHS v. FLRA*, 894 F.2d 333 (9th Cir. 1990); and *United States v. Fausto*, 484 U.S. 439, 445-47 (1988), in holding that the Civil Service Reform Act: 1) establishes a preferred position for competitive service and preference eligible employees; and 2) is designed to ensure uniform results in appeals of adverse actions taken under 5 U.S.C. § 7512 and performance based actions taken under 5 U.S.C. § 4303(e). In order to ensure uniform results, the Civil Service Reform Act restricts review of appeals to the MSPB and the Federal Circuit. Arbitrators and the Federal Labor Relations Authority are not bound by MSPB and Federal Circuit precedent. As such, the uniformity of results desired by the Civil Service Act could be undermined if the negotiated grievance procedure is extended to nonpreference-eligible, excepted service employees.

The FLRA followed this in a subsequent case where a excepted service employee was suspended for thirty days for damaging government property. The arbitrator's ruling was set aside by the FLRA on the grounds that the arbitrator was precluded by law from resolving the grievance over the thirty-day suspension. *Panama Canal Commission and International Association of Firefighters Local 13 Balboa, Republic of Panama*, 35 FLRA No. 125 (1990).

Union Representation

The FLRA has ruled that proposals allowing a union to represent a worker with whom a supervisor is discussing the issuance of an opportunity-to-improve performance letter is negotiable. The Civil Service Reform Act grants the union the right to be present at formal discussions between management and employees. This does not, however, preclude a union from bargaining to represent workers in other situations. The FLRA ruled that this proposal is not in conflict with the procedures outlined in 5 C.F.R. § 432.204 for effecting demotions and removals for unacceptable performance. This proposal also does not interfere with the managements right to direct employees and assign work. 34 FLRA No. 154 (1990).

Negotiability of Performance Appraisals

The FLRA ruled on three proposals concerning the negotiability of performance appraisals. The first proposal stated that, in so far as practicable, the agency's performance appraisal system would be fair, equitable, and job-related. The authority rejected the union's assertion that the proposal established general, nonquantitative criteria that applied to the application of the appraisal system. FLRA noted that the plain language of the proposal encompassed the entire appraisal system, to include the formulation of performance standards. FLRA has long held that proposals restricting management's authority to determine the content of performance standards are contrary to the rights to assign work and direct employees. The qualifying language, "in so far as practicable," did not remove the substantive limitations on management rights and thus did not make the proposal negotiable.

The second proposal provided that the appraisal system will be the principal source of performance appraisal information in actions such as rewarding, training, etc. The proposal was considered negotiable, as it merely mirrors the requirements of 5 U.S.C. 4302.

The third proposal, permitting employees to be represented by the union at performance appraisal meetings, is also considered negotiable. *AFGE and Dep't of Education*, 34 FLRA No. 170, 34 FLRA 1114 (1990).

Union Advertisements

The FLRA denied General Counsel's exception to an ALJ recommended decision on a complaint alleging violation of section 7116(a) (1). In so doing, the FLRA discussed the use of agency newspapers by unions. The Air Force refused to permit the contractor for its base newspaper to run a union ad as written. The union ad initially contained a headline about the implementation of a performance appraisal quota system at the base. The agency refused to run the ad unless the union revised the language to pose the headline as a question. The respondent wanted to make it clear that it was the union's opinion, rather than a known fact, that there was a quota system.

The FLRA rejected the General Counsel's argument that the base had subjected the union's ad to closer scrutiny than those of other advertisers. It found that the governing Air Force regulation reserved the base's right to police the content of newspaper advertising. The union's collective bargaining agreement binding them to "existing regulations" incorporated that regulation by reference.

The FLRA recognized that a union has a statutory right to publicize matters affecting working conditions. This statutory right includes the use of employer's property as a site of communication, as in handbilling in nonwork areas. That right, however, does not extend to using the *property* as a means of communication. The FLRA held that "neither a union nor an employee has a statutory right to post material in public areas on agency property." The FLRA concluded that placing an advertisement in an agency-controlled newspaper is analogous to posting material on agency property. As such, the union has no statutory right to advertise in the agency paper. The FLRA recognized that such a right is a proper topic

for negotiations. In such cases, the remedy for violation of that right would be the negotiated grievance procedure, unless a finding of a contract repudiation would cause a ULP to lie. The FLRA stated, "To the extent that previous Authority decisions suggest that, absent a finding of contract repudiation, an unfair labor practice may be found for a violation of a union's right of access to agency property that has been established solely through collective bargaining, those cases will no longer be followed." *Dep't of the Air Force, Scott AFB and NAGE,* 34 FLRA No. 172, 34 FLRA 1129 (1990).

Attorneys' Fees

The FLRA continues its strict construction of the Back Pay Act. The Navy filed exceptions to an arbitration decision that awarded attorneys' fees as part of its order restoring grievant to a GS-9 position. Grievant was assigned to GS-5 position from a GS-9 position due to a reduction in force (RIF). Though grievant was placed in a GS-5 position, he was still in a retained grade status at the time of the arbitration award. As a result, he had not yet suffered any loss of pay from the RIF. The arbitrator concluded that the agency reassigned grievant in bad faith without just cause. The arbitrator awarded attorneys' fees, even though no back pay was awarded. The FLRA reversed. They held that the Back Pay Act allows payment of attorneys' fees only in conjunction with an award of back pay, allowances, or differentials. Because grievant was not awarded back pay, he was not entitled to attorneys' fees. The FLRA insisted on a literal construction of the Act, even though grievant would have suffered a loss of pay when his retained grade status ceased shortly after the arbitration award. *Western Division, Naval Facilities Engineering Command and AFGE,* 35 FLRA No. 4 (1990).

Negotiability of Discipline

The FLRA reviewed a union negotiability appeal on its proposal that Fort Bragg consider only like prior offenses when determining appropriate disciplinary action for later misconduct. The FLRA applied existing precedent in finding that such language would limit management's discretion in penalty selection and thus interferes with its right to discipline. It rejected the union's argument that the proposal was an appropriate arrangement. The FLRA ruled that this restriction excessively interferes with the right to discipline, and that the interference outweighs any benefit from having lesser penalties imposed on the employee. *AFGE and HQ XVIII Airborne Corps and Fort Bragg,* 34 FLRA No. 151 (1990).

Criminal Law Division Note

Criminal Law Division, OTJAG

Supreme Court—1989 Term, Part IV

Colonel Francis A. Gilligan
Lieutenant Colonel Stephen D. Smith

In *Grady v. Corbin*[1] a majority of the Supreme Court expanded the protection afforded by the double jeopardy clause beyond the traditional *Blockburger*[2] test. When an essential element of a charged offense in a subsequent prosecution is proven by conduct constituting an offense for which the accused has already been tried, the second prosecution is barred. Military practitioners should find this language strikingly similar to that which is used in the area of multiplicity. In fact, Justice Scalia's dissent foretells confusion in double jeopardy litigation similar to that which surrounds multiplicity in the military trial courts.[3]

On October 3, 1987, Thomas Corbin drove his car across a double yellow dividing line and struck two oncoming cars. Several hours later, a woman died of injuries sustained in the crash. Corbin was issued two traffic citations: one for driving while intoxicated[4] and a second for failing to keep right of the median. Because of what appears to be a lack of coordination within the district attorney's office, Corbin eventually pleaded guilty and was sentenced on the two traffic citations without any mention being made of the death or the fact that the district attorney's office was investigating the death case.[5] Two months later, a grand jury returned an indictment

[1] 47 Crim. L. Rep. (BNA) 2091 (U.S. May 29, 1990).

[2] Blockburger v. United States, 284 U.S. 299 (1932).

[3] Criticism of trial attorneys is not intended. Rather, the comment is directed toward suggesting that in any area of the law where litigation at the appellate level is continuous, inconsistent, and frequently summary, further definitive guidance from the maker of the law, in this case the Court of Military Appeals, is necessary.

[4] Corbin's BAT was .19%, nearly twice the presumptive level of intoxication in New York. 47 Crim. L. Rep. at 2092.

[5] *Id.* The assistant district attorney present at sentencing for the traffic tickets did not even know that there had been a fatality associated with the accident.

against Corbin for reckless manslaughter, second-degree vehicular manslaughter, criminally negligent homicide for causing the death, third degree reckless driving for causing injuries to other persons, and driving while intoxicated. To prove the homicide charges and the assault, the state identified driving while intoxicated, crossing the median, and excessive speed for road conditions as the reckless or negligent acts upon which it would rely. Corbin moved to dismiss the indictment on statutory and constitutional double jeopardy grounds.

Noting the similarity between the facts of this case and those of *Illinois v. Vitale*,[6] the majority held that claims of double jeopardy must be assessed by a two-step process. First, the traditional *Blockburger* test is applied to determine whether one offense requires proof of a fact that the other offense does not. Under this test, if the elements are identical or one offense is a lesser included of another, then prosecution is barred.[7] The second step of the process focuses on the fact that the double jeopardy clause protects against enhanced punishments as well as against subsequent prosecutions.[8] Thus, if *Blockburger* does not preclude the prosecution, then the court must look at whether the government will prove *conduct* constituting an offense for which the accused has already been prosecuted in order to prove an element of the charged offense.[9]

As applied to Corbin, the majority noted that the state intended to use virtually every act for which Corbin was previously convicted to establish essential elements of the homicide and assault offenses, i.e., intoxicated driving and crossing the center line. The second trial for homicide and assault would not be barred, however, if the state relied solely on driving too fast for road conditions. Finally, the majority notes that "with adequate preparation and foresight," the state could have tried all offenses in a single proceeding, thus avoiding the double jeopardy question.[10]

In dissent, Justice Scalia traced the history of the double jeopardy clause and concluded that its protections are against prosecution for the same offense, not against prosecution for a different offense that may be supported by the same conduct.[11] The dissent also questioned how trial judges are to apply the Court's "same conduct" test: will the trial judge preview the evidence or rule mid-trial; what standard of proof applies; how far will the defense counsel be permitted to go to introduce evidence of the same conduct to obtain a favorable double jeopardy ruling under *Corbin*?[12] Justice Scalia concluded with a prediction that the uncertainty created by the majority will lead to the final extension where the double jeopardy rule precludes prosecutions arising from the "same facts" as a previous trial. This "same transaction" theory, according to Justice Scalia, has little support in the double jeopardy clause, but it does have the merit of simplicity.[13]

Had Justice Scalia dabbled in the military multiplicity maze, he might not be so quick to heap praise on transaction theories. Military trial judges, with scant indication of what the evidence will be, are asked to review unending combinations of charges and specifications to determine whether they are "multiplicious." "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges"[14] is a theme echoing through courts-martial. Yet, the frequency with which military appellate courts grant relief for "multiplicity," often in summary opinions without analysis or factual foundation evident, should cast serious doubts on the appeal of a transaction theory of double jeopardy.

By contrast, however, military practice does not have a significant problem with double jeopardy. This is due in large part to the preference that all known charges be tried in a single proceeding.[15] As noted, Justice Brennan's majority opinion suggested this practice for others: "With adequate preparation and foresight, the State could have prosecuted Crobin for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding this double jeopardy question."[16]

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[6] 447 U.S. 410 (1980).

[7] 47 Crim. L. Rep. at 2093.

[8] *Id.*

[9] *Id.* at 2094.

[10] *Id.* at 2095.

[11] *Id.* at 2096 (Scalia, J., dissenting).

[12] *Id.* at 2099-2100.

[13] *Id.* at 2100.

[14] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 307(c)(4) discussion [hereinafter MCM, 1984, and R.C.M.]. *See also* R.C.M. 906(b)(12) and R.C.M. 1003(c)(1)(C) discussion.

[15] R.C.M. 601(e)(2) discussion provides that "[o]rdinarily all known charges should be referred to a single court-martial."

[16] 47 Crim. L. Rep. at 2095.

Until this suggestion becomes practice, the practical impact of the *Corbin* decision will be better monitoring of felony and misdemeanor divisions within the district attorney's office.

In an earlier note[17] we discussed *Dowling v. United States.*[18] There, the prosecution had used identity evidence involving a previous robbery, for which Dowling was acquitted, to establish that Dowling was the perpetrator of a separate robbery. The Court held that neither the double jeopardy clause nor the due process clause prohibited this evidence. In *Corbin* both Justice Scalia's dissent and Justice O'Connor's dissent suggest that *Corbin* undermines the continued validity of *Dowling*. The dissents over-emphasize the breadth of *Corbin*. First, Dowling was not subjected to successive prosecutions or, assuming proper sentencing proceedings, multiple punishment for the initial robbery. Second, the second prosecution for a different robbery did not constitute "repeated attempts [by the state] to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."[19] Third, *Dowling* could be viewed as an evidentiary issue and collateral estoppel case rather than as a true double jeopardy case.[20]

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[17]Gilligan & Smith, *Supreme Court — 1989 Term*, The Army Lawyer, Apr. 1990, at 87.

[18]46 Crim. L. Rep. (BNA) 2057 (U.S. Jan. 10, 1990).

[19]47 Crim. L. Rep. at 2093 (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

[20]In *Dowling* the Court rejected the collateral estoppel argument based upon Ashe v. Swenson, 397 U.S. 436 (1970), and determined that the trial judge could protect the defendant under Federal Rule of Evidence 404(b) by excluding potentially prejudicial evidence.

Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

The Judge Advocate General's School Continuing Legal Education (On-Site) Training

The following schedule sets forth the training sites, dates, subjects, and local action officers for The Judge Advocate General's School Continuing Legal Education (On-Site) Training program for Academic Year (AY) 1991. The Judge Advocate General has directed that all Reserve component judge advocates assigned to the Judge Advocate General Service Organizations (JAGSOs) or the judge advocate sections of USAR and ARNG troop program units attend the training in their geographical area (AR 135-316). All other judge advocates (Active, Reserve, National Guard, and other services) are strongly encouraged to attend the training sessions in their areas. The on-site program features instructors from The Judge Advocate General's School, U.S. Army (TJAGSA), and has been approved for Continuing Legal Education (CLE) credit in most states. Some on-sites also feature instruction by judge advocates from other services and from local civilian attorneys. The civilian bar is invited and encouraged to attend on-site training.

Action officers are required to coordinate with all Reserve component units in their geographical area that have assigned judge advocates. Invitations will be issued to staff judge advocates of nearby active armed installations. Action officers will notify all members of the Individual Ready Reserve (IRR) that the training will occur in their geographical area. Limited funding from ARPERCEN is available, on a case-by-case basis, for IRR members to attend on-sites in an ADT status. Applications for ADT should be submitted eight to ten weeks prior to the scheduled on-site to Commander, ARPERCEN, ATTN: DARP-OPS-JA (LTC Kuklok), 9700 Page Boulevard, St. Louis, MO 63132-5260. Members of the IRR may also attend for retirement point credit pursuant to AR 140-185. These actions provide maximum opportunity for interested JAGC officers to take advantage of this training.

Whenever possible, action officers will arrange legal specialists/NCO and court reporter training to run concurrently with on-site training. In the past, enlisted training programs have featured Reserve component JAGC officers and noncommissioned officers as instructors as well as active duty staff judge advocates and instructors from the Army legal clerk's school at Fort Benjamin Harrison. A model training plan for enlisted soldier on-sites has been distributed to assist in planning and conducting this training.

JAGSO detachment commanders and SJAs of other Reserve component troop program units will ensure that unit training schedules reflect the scheduled on-site training. Attendance may be scheduled as RST (regularly scheduled training), as ET (equivalent training), or on

manday spaces. It is recognized that many units providing mutual support to active armed forces installations may have to notify the SJA of that installation that mutual support will not be provided on the day(s) of instruction.

Questions concerning the on-site instructional program should be directed to the appropriate action officer at the local level. Problems that cannot be resolved by the action officer or the unit commander should be directed to Captain Natalie Griffin, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (telephone 804/972-6380).

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 91

DATE	*CITY, HOST UNIT AND TRAINING SITE*	*SUBJECT/INSTRUCTOR/ GRA REP/RC GO*		*ACTION OFFICER*
13, 14 Oct 90	New York, NY 4th MLC/77th ARCOM Fordham University School of Law New York, NY	Crim Law Int'l Law GRA Rep RC GO	MAJ Borch MAJ Walsh COL Curtis BG Ritchie	LTC Harvey Barrison c/o D'Amato & Lynch, 70 Pine St. New York, NY 10270-0110 (212) 269-0927
20, 21 Oct 90	Minneapolis, MN 214th MLC Thunderbird Motel 2201 E 78th Street Bloomington, MN 55420	Crim Law Int'l Law GRA Rep RC GO	LTC Holland MAJ Myhre COL Gentry COL(P) Compere	MAJ Jack Elmquist 2450 Centre Village 431 S. 7th Street Minneapolis, MN 55415 (612) 371-9472
20, 21 Oct 90	Philadelphia, PA 153rd MLC TBD	Contract Law Int'l Law GRA Rep RC GO	CPT Helm MAJ Welton LTC Doll BG Ritchie	LTC Robert Wert Box 1690 Route 1 Hollow Road Malvern, PA 19355 (215) 569-5773
26-28 Oct 90	St. Louis, MO 89th & 102d ARCOM'S Marriot Hotel St. Louis, MO	Crim Law GRA Rep RC GO	MAJ Borch CPT Tate COL Curtis BG Ritchie	COL Claude McElwee HQ, 102d ARCOM 4301 Goodfellow Blvd. St. Louis, MO 63120-1794 (314) 963-1110
3 Nov 90	Detroit, MI 300th MP Cmd Zussman USAR Center 3200 S. Beech Daly Inkster, MI 48141	Crim Law Ad & Civ Law GRA Rep RC GO	MAJ Milhizer CPT Comodeca COL Curtis COL(P) Compere	COL Peter Kirchner 41351 Harris Rd. Belleville, MI 48111 (313) 594-7421
4 Nov 90	Indianapolis, IN 136th JAG Det Ft. Ben Harrison, IN	Crim Law Ad & Civ Law GRA Rep RC GO	MAJ Milhizer CPT Comodeca COL Curtis COL(P) Compere	CPT Ellen Fujawa 642 Meadowview Lane Greenwood, IN 46142 (317) 882-5551
7-9 Dec 90	Houston, TX 90th ARCOM/5th Army Post Oak Double Tree Hotel Houston, TX 77056	Ad & Civ Law Int'l Law GRA Rep RC GO	MAJ McCallum MAJ Addicott Dr. Foley BG Ritchie COL(P) Compere	LTC Don Burgess P.O. Box 954 Bridge City, TX 77611 (409) 835-8403
4-6 Jan 91	Los Angeles, CA 78th MLC Long Beach Airport Marriot Long Beach, CA	Crim Law Ad & Civ Law GRA Rep RC GO	MAJ Warner MAJ Ingold LTC Doll BG Ritchie	CPT Thomas C. McLurkin, Jr. Office of the City Attorney 333 S. Beaudry Avenue Los Angeles, CA 90017 (213) 481-6302
19, 20 Jan 91	Seattle, WA 6th MLC University of Washington School of Law Seattle, WA	Ad & Civ Law Int'l Law GRA Rep RC GO	MAJ Bell MAJ Walsh COL Curtis COL Morrison	LTC Paul Burke 6th MLC 4505 36th Avenue, West Seattle, WA 98199 (206) 281-3002 or (206) 623-3427

9, 10 Feb 91	Savannah, GA Georgia ARNG Savannah Hilton Savannah, GA	Ad & Civ Law Int'l Law GRA Rep RC GO	MAJ Battles LTC Elliott LTC Doll COL Morrison	LTC Robert Wommack P.O. Box 331 Tennille, GA 31089 (912) 552-2150
23 Feb 91	Denver, CO 83rd JAG Det Fitzsimmons Army Medical Center	Ad & Civ Law Int'l Law GRA Rep RC GO	CPT Hatch MAJ Walsh Dr. Foley COL(P) Compere	LTC Edward Lewkowski 12972 West Jewell Circle Lakewood, CO 80228 (303) 844-3083
24 Feb 91	Salt Lake City, UT 87th MLC Bldg. 100 Ft. Douglas, UT	Ad & Civ Law Int'l Law GRA Rep RC GO	CPT Hatch MAJ Walsh Dr. Foley COL(P) Compere	LTC Michael Smith 145 East Center Provo, UT 84606 (801) 377-6056
2, 3 Mar 91	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC	Crim Law Ad & Civ Law GRA Rep RC GO	LTC LeClair CPT Bowman CPT Griffin COL(P) Compere	MAJ Edward Hemilton South Carolina Nat'l Bank 101 Greystone Blvd. Columbia, SC 29210 (803) 765-3227
16, 17 Mar 91	Washington, DC 10th MLC Humphrey's Hall Fort Belvoir, VA	Int'l Law Contract Law GRA Rep RC GO	MAJ Welton MAJ Dorsey LTC Doll COL(P) Compere	LTC Frank Carr 4233 Dancing Sunbeam Ct. Ellicott City, MD 21043 (202) 272-0033
16, 17 Mar 91	San Francisco, CA 5th MLC 6th Army Conf. Room Presidio of San Francisco	Crim Law Ad & Civ Law GRA Rep RC GO	MAJ Merck LTC Merck COL Gentry COL Morrison	COL David Schreck 5th Military Law Center Bldg. 1230 Presidio of San Francisco, CA 94129-7000 (415) 561-2038 or (415) 557-3030
23, 24 Mar 91	Wakefield, MA 94th ARCOM TBD	Int'l Law Contract GRA Rep RC GO	MAJ Welton MAJ Jones CPT Griffin BG Ritchie	COL Gerald D'Avolio 4 Bancroft Street Lynnfield, MA 01940 (617) 523-4860
6, 7 Apr 91	Chicago, IL 96th JAG Det 4th Army Conf. Room Fort Sheridan, IL 60037	Int'l Law Crim Law GRA Rep RC GO	MAJ Myhre CPT Cuculic Dr. Foley COL Morrison	CPT Kevin Kney 96th JAG Det Bldg. 82 Fort Sheridan, Il 60037 (815) 226-2891
13, 14 Apr 91	Louisville, KY 139th MLC Hurstourne Inn Louisville, KY	Int'l Law Crim Law GRA Rep RC GO	MAJ Walsh MAJ Borch CPT Griffin COL Morrison	LTC James H. Barr 100 Westwind Rd. Louisville, KY 40207 (502) 582-5911
30 Apr, 1 May 91	San Juan, Puerto Rico 7581st U.S. Army Garrison Fort Buchanan San Juan, Puerto Rico	Int'l Law Crim Law GRA Rep RC GO	MAJ Addicott MAJ Gerstenlauer COL Gentry BG Ritchie	TBD
4, 5 May 91	Fort McClellan, AL 3rd Transportation Bde U.S. Army Chemical School	Crim Law Int'l Law GRA Rep RC GO	LTC LeClair MAJ Addicott COL Gentry COL Morrison	MAJ Joseph Doyle OSJA, ATZN-JA Fort McClellan, AL 36205-5000 (205) 848-5436
4, 5 May 91	Columbus, OH 9th MLC Defense Supply Center Bldg. 11, 3990 E Broad Columbus, OH 43216-5004	Contract Law Ad & Civ Law GRA Rep RC GO	MAJ Cameron CPT Connor CPT Griffin COL(P) Compere	MAJ William A. Reddington 2092 Harwitch Rd. Columbus, OH 43221 (614) 462-3896
17-19 May 91	Oklahoma City, OK 122nd ARCOM TBD	Ad & Civ Law GRA Rep RC GO	MAJ Pottorff CPT Lassus COL Gentry BG Ritchie	MAJ Greg Davis 101 Park Ave., Suite 250 Oklahoma City, OK 73102 (405) 232-8704

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1990

10-14 September: 8th Contract Claims, Litigation & Remedies Course (5F-F13).

17-19 September: Chief Legal NCO Workshop.

17-21 September: 12th Legal Aspects of Terrorism Course (5F-F43).

*1-5 October: 1990 Annual CLE Training Program.

15-19 October: 27th Legal Assistance Course (5F-F23).

15 October-19 December: 123d Basic Course (5-27-C20).

22-26 October: 4th Program Managers Attorneys Course (5F-F19).

22-26 October: 46th Law of War Workshop (5F-F42).

29 October-2 November: 4th Procurement Fraud Course (5F-F36).

29 October-2 November: 104th Senior Officers Legal Orientation Course (5F-F1).

5-9 November: 25th Criminal Trial Advocacy Course (5F-F32).

26-30 November: 31st Fiscal Law Course (5F-F12).

3-7 December: 8th Operational Law Seminar (5F-F47).

10-14 December: 38th Federal Labor Relations Course (5F-F22).

1991

7-11 January: 1991 Government Contract Law Symposium (5F-F11).

22 January-29 March: 124th Basic Course (5-27-C20).

28 January-1 February: 105th Senior Officer's Legal Orientation Course (5F-F1).

4-8 February: 26th Criminal Trial Advocacy Course (5F-F32).

25 February-8 March: 123d Contract Attorneys Course (5F-F10).

11-15 March: 15th Administrative Law for Military Installations (5F-F24).

18-22 March: 47th Law of War Workshop (5F-F42).

25-29 March: 28th Legal Assistance Course (5F-F23).

1-5 April: 2d Law for Legal NCO's Course (512-71D/E/20/30). 8-12 April: 9th Operational Law Seminar (5F-F47).

8-12 April: 106th Senior Officers Legal Orientation Course (5F-F1).

15-19 April: 9th Federal Litigation Course (5F-F29).

29 April-10 May: 124th Contract Attorneys Course (5F-F10).

8-10 May: 2d Center for Law and Military Operations Symposium (5F-F48).

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course.

17-28 June: JATT Team Training.

17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

*NOTE—Attendance at the 1990 Judge Advocate General's Annual Continuing Legal Education Training Program is by invitation only. Invitations will be mailed on or about 6 August 1990. It is important that course nominees notify TJAGSA of their intention to attend by the suspense date set in the invitation. The course POC is Captain John W. Miller II, (ATTN: JAGS-SSJ). He can be reached at 1-800-444-5914 ext. 322 or AV 668-6322.

3. Civilian Sponsored CLE Courses

November 1990

1: ALIABA, Annual Fall Pension Law Update (Satellite), 60 cities USA.

1: NYSBA, Deposition Practice, New York, NY.

1-2: PLI, Basics of Bankruptcy and Reorganization, New York, NY.

1-2: ALIABA, Prosecution and Defense of a Lender Liability Lawsuit, New York, NY.

1-3: PLI, Institute on Securities Regulation, New York, NY.

1-3: ALIABA, Inverse Condemnation and Related Government Liability, Atlanta, GA.

1-3: NJC, Judges: Protection from Employment Discrimination Case, Orlando, FL.

1-11: NITA, North Central Regional Trial Advocacy Program, Minneapolis, MN.

2: NYSBA, Federal Criminal Practice, New York, NY.

2: NYSBA, Update '90, New York, NY.

2-3: LSU, Annual Estate Planning Seminar, Baton Rouge, LA.

4-9: AAJE, Decision Making in Custody, Child Support and Other Domestic Relations Cases—Techniques and Guidelines, Orlando, FL.

4-9: AAJE, Trial Skills Workshop, Orlando, FL.

4-16: NJC, Administrative Law: Fair Hearing, Reno, NV.

5: NYSBA, Handling Controversies with the IRS, New York, NY.

5-9: ESI, Federal Contracting Basics, Los Angeles, CA.

6-9: ESI, ADP Contracting, Washington, D.C.

8-9: ALIABA, Biotechnology Law, San Francisco, CA.

8-9: PLI, Communications Law, New York, NY.

8-9: ABA, Criminal Tax Fraud, San Francisco, CA.

8-9: LSU, Developments in Legislation and Jurisprudence, Shreveport, LA.

8-9: PLI, Estate Planning Institute, St. Louis, MO.

8-9: PLI, Patent Litigation, Los Angeles, CA.

8-9: PLI, Title Insurance, Chicago, IL.

8-10: ALIABA, Trial Evidence, Civil Practice and Litigation Techniques, Washington, D.C.

9: NYSBA, Deposition Practice, Rochester, NY.

11-16: NCDA, Special Prosecutions, New Orleans, LA.

11-16: NCDA, Trial of the Juvenile Offender, Los Angeles, CA.

12-13: PLI, Civil RICO, New York, NY.

12-13: PLI, Real Estate Partnerships and Bankruptcy, New York, NY.

13-15: GWU, Source Selection Workshop, Washington, D.C.

15-16: PLI, Litigating Copyright, Trademark & Unfair Competition, New York, NY.

15-16: PLI, Basics of Bankruptcy and Reorganization, Chicago, IL.

15-16: STCL, Financial Institutions, Houston, TX.

15-16: ALIABA, Securing and Enforcing Patent Rights, Washington, D.C.

16: NYSBA, Medicine in the Courtroom, New York, NY.

16-17: LSU, Jury Practice, Baton Rouge, LA.

16-17: ABA, Legal Opinions, San Francisco, CA.

25-28: NCDA, Child Abuse and Exploitation, Atlanta, GA.

25-December 7: NJC, Special Court-Intermediate Jurisdiction, Reno, NV.

26-30: GWU, Construction Contracting, Washington, D.C.

28: ESI, Employment Issues for Government Contractors, Washington, D.C.

28-30: ALIABA, How to Handle Tax Controversy at the IRS and in Court, Philadelphia, PA.

29-30: PLI, Basics of Bankruptcy and Reorganization, San Francisco, CA.

29-December 1: ALIABA, Advanced Employment Law and Litigation, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below:

AAJE: American Academy of Judicial Education, 2025 Eye Street, NW., Suite 824, Washington, D.C. 20006. (202) 755-0083.

ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ABICLE: Alabama Bar Institute for Continuing Legal Education, P. O. Box 870384, Tuscaloosa, AL 35487-0384. (205) 348-6230.

AICLE: Arkansas Institute for CLE, 400 West Markham, Little Rock, AR 72201. (501) 375-3957.

AKBA: Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. (907) 272-7469.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS; (215) 243-1600.

ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, NW., Washington, D.C. 20037. (800) 424-9890 (conferences); (202) 452-4420 (conferences); (800) 372-1033; (202) 258-9401.

CHBA: Chicago Bar Association, CLE, 29 South LaSalle Street, Suite 1040, Chicago, IL 60603. (312) 782-7348.

CLEC: Continuing Legal Education in Colorado, Inc., 1900 Grant Street, Suite 900, Denver, CO 80203. (303) 860-0608.

CLESN: CLE Satellite Network, 920 Spring Street, Springfield, IL 62704. (217) 525-0744, (800) 521-8662.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53715. (608) 262-3588.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

FBA: Federal Bar Association, 1815 H Street, NW., Washington, D.C. 20006-3604. (202) 638-0252.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885,, Athens, GA 30603. (404) 542-2522.

GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.

GULC: Georgetown University Law Center, CLE Division, 777 N. Capitol Street, N.E., Suite 405, Washington, D.C. 20002. (202) 408-0990.

GWU: Government Contracts Program, The George Washington University, National Law Center, 2020 K Street, N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.

HICLE: Hawaii Institute for CLE, UH Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822-2369. (808) 948-6551.

ICLEF: Indiana CLE Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204. (317) 637-9102.

IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.

KBA: Kansas Bar Association, 1200 Harrison Street, P.O. Box 1037, Topeka, KS 66601. (913) 234-5696.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1008. (504) 388-5837

MBC: Missouri Bar Center, 326 Monroe St., P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 20 West Street, Boston, MA 02111. (800) 632-8077; (617) 482-2205.

MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

MILE: Minnesota Institute of Legal Education, 25 South Fifth Street, Minneapolis, MN 55402. (612) 339-MILE.

MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.

MICPEL: Maryland Institute for Continuing Professional Education of Lawyers, Inc. 520 W. Fayette Street, Baltimore, MD 21201. (301) 238-6730.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04332-0788. (207) 622-7523.

NCBF: North Carolina Bar Foundation, 1312 Annapolis Drive, P.O. Box 12806, Raleigh, NC 27605. (919) 828-0561.

NCCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCDA: National College of District Attorneys, University of Houston Law Center, 4800 Calhoun Street, Houston, TX 77204-6380. (713) 747-NCDA.

NCJFC: National College of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8970, Reno, NV 89507. (702) 784-4836.

NCLE: Nebraska CLE, Inc., 635 South 14th Street, P.O. Box 81809, Lincoln, NB 68501. (402) 475-7091.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

NIBL: Norton Institutes on Bankruptcy Law, P.O. Box 2999, 380 Green Street, Gainesville, GA 30503. (404) 535-7722.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: New Jersey Institute for CLE, One Constitution Square, New Brunswick, NJ 08901-1500. (201) 249-5100.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland Hts., KY 41076. (606) 572-5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.

NPI: National Practice Institute, 330 Second Avenue South, Suite 770, Minneapolis, NM 55401. (612) 338-1977, (800) 328-4444.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908-8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200; (800) 582-2452 .

NYUSCE: New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580-5200.

NYUSL: New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212) 598-2756.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201-0220. (614) 421-2550.

PBI: Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.

SBA: State Bar of Arizona, 363 North First Avenue, Phoenix, AZ 85003. (602) 252-4804.

SBMT: State Bar of Montana, P.O. Box 577, Helena, MT 59624-0577 (406) 442-7660.

SBT: State Bar of Texas, Professional Development Program, Capitol Station, P.O. Box 12487, Austin, TX 78711. (512) 463-1437.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211-1039. (803) 771-0333.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214) 690-2377.

STCL: South Texas College of Law, 1303 San Jacinto Street, Houston, TX 77002-7006. (713) 659-8040.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506-0048. (606) 257-2922.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

USB: Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. (801) 531-9077.

USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90089-0071. (213) 743-2582.

USTA: United States Trademark Association, 6 East 45th Street, New York, NY 10017. (212) 986-5880.

UTSL: University of Texas School of Law, 727 East 26th Street, Austin, TX 78705. (512) 471-3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

WSBA: Washington State Bar Association, Continuing Legal Education, 500 Westin Building, 2001 Sixth Avenue, Seattle, WA 98121-2599. (206) 448-0433.

WTI: World Trade Institute, One World Trade Center, 55 West, New York, NY 10048. (212) 466-4044.

4. Army Sponsored Continuing Legal Education Calendar (1 August 1990—30 September 1991)

The following is a schedule of Army Sponsored Continuing Legal Education, not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972-6380; Trial Judiciary, (703) 756-1795; Trial Counsel Assistance Program (TCAP), (202) 756-1804; U.S. Army Trial Defense Service (TDS), (202) 756-1390; U.S. Army Claims Service, (301) 677-7622; Office of the Judge Advocate, U.S. Army Europe & Seventh Army (POC: MAJ Gordon, Heidelberg Military 8459). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: CPT Cuculic, TJAGSA, (804) 972-6342.

TRAINING	LOCATION	DATES
USAREUR Branch Office CLE	Heidelberg, FRG	10 Aug 90
USAREUR Contract Law-Procurement Fraud Advisor CLE	Heidelberg, FRG	17 Aug 90
USAREUR Staff Judge Advocates CLE	Heidelberg, FRG	23-24 Aug 90
5th Judicial Circuit Conference	Garmisch, FRG	3-7 Sep 90
USAREUR Legal Assistance CLE	Garmisch, FRG	4-7 Sep 90
TCAP Seminar	Ft Bragg, NC	5-7 Sep 90
TJAGSA On-Site	New York, NY	13-14 Sep 90
USAREUR Criminal Law CLE I	Chiemsee, FRG	8-10 Oct 90
USAREUR Criminal Law Trial Advocacy CLE	Chiemsee, FRG	11-13 Oct 90
USAREUR Criminal Law CLE II	Chiemsee, FRG	15-17 Oct 90
Trial Defense Service Region II Workshop	Hunter Army Air-Field, GA	17-19 Oct 90
TCAP Seminar	Honolulu, HI	17-19 Oct 90
USAREUR International Law Trial Observers CLE	Heidelberg, FRG	18-19 Oct 90
TJAGSA On-Site	Minneapolis, MN	20-21 Oct 90
TJAGSA On-Site	Philadelphia, PA	20-21 Oct 90
TCAP Seminar	Seoul, ROK	25-26 Oct 90
TJAGSA On-Site	St. Louis, MO	26-28 Oct 90
TJAGSA On-Site	Indianapolis, IN	3-4 Nov 90
USAREUR Judge Advocate's Management CLE	Berchtesgaden, FRG	18-20 Nov 90
USAREUR International Law CLE	Berchtesgaden, FRG	26-30 Nov 90
TJAGSA On-Site	Houston, TX	30 Nov-2 Dec 90
USAREUR Claims Service CLE	Mannheim, FRG	10-14 Dec 90
TJAGSA On-Site	Los Angeles, CA	4-6 Jan 91
USAREUR Legal Assistance Income Tax CLE	Ramstein, FRG	14-18 Jan 91
TJAGSA On-Site	Seattle, WA	19-20 Jan 91
Far East Legal Assistance Income Tax CLE	Seoul, ROK	22-23 Jan 91
USAREUR Administrative Law CLE	Heidelberg, FRG	11-15 Feb 91
TJAGSA On-Site	Savannah, GA	9-10 Feb 91
TJAGSA On-Site	Denver, CO	23 Feb 91
TJAGSA On-Site	Salt Lake City, UT	24 Feb 91
TJAGSA On-Site	Columbia, SC	2-3 Mar 91
TJAGSA On-Site	Washington, DC	16-17 Mar 91
TJAGSA On-Site	Wakefield, MA	23-24 Mar 91
TJAGSA On-Site	San Francisco, CA	30-31 Mar 91
TJAGSA On-Site	Chicago, IL	6-7 Apr 91
USAREUR Contract Law CLE	Heidelberg, FRG	8-12 Apr 91
TJAGSA On-Site	Louisville, KY	13-14 Apr 91
TJAGSA On-Site	Fort McClellan, AL	4-5 May 91

TRAINING	LOCATION	DATES
TJAGSA On-Site	Columbus, OH	4-5 May 91
TJAGSA On-Site	Oklahoma City, OK	17-19 May 91
USAREUR Operational Law CLE	Heidelberg, FRG	21-24 May 91
USAREUR Staff Judge Advocates CLE	Heidelberg, FRG	30-31 May 91
USAREUR Legal Assistance	Garmisch, FRG	3-6 Sep 91

5. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Jersey	12-month period commencing on first anniversary of bar exam
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For address and detailed information, see the July 1990 issue of *The Army Lawyer*.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B100211	Contract Law Seminar Problems/ JAGS-ADK-86-1 (65 pgs).
AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
*AD B144679	Fiscal Law Course Deskbook/ JA-506-90 (270 pgs).

Legal Assistance

AD B089092	All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
AD B092128	USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
AD B116099	Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
AD B116103	Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
AD B124194	1988 Legal Assistance Update/JAGS-ADA-88-1
AD B124120	Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).
AD B136218	Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135453	Legal Assistance Guide Real Property /JAGS-ADA-89-2 (253 pgs).
AD B135492	Legal Assistance Guide Consumer Law /JAGS-ADA-89-3 (609 pgs).
AD B142445	Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90 (175 pgs).
AD B141421	Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

Claims

AD B108054	Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS-ADA-84-7 (76 pgs).
AD B100251	Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/ JAGS-ADA-86-9 (146 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
AD B139524	Government Information Practices/ JAGS-ADA-89-6 (416 pgs).
AD B139522	Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).
AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

AD B139523	Law of Federal Employment/JAGS-ADA-89-4 (450 pgs).
AD B139525	Law of Federal Labor-Management Relations/JAGS-ADA-89-5 (452 pgs).

Developments, Doctrine & Literature

AD B124193	Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212	Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B135459	Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).
*AD B137070	Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).
AD B140529	Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).
AD B140543	Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 10-88	Organizations and Functions	30 May 90
AR 27-55	Authority of Armed Forces Personnel to Perform Notarial Acts	18 Jun 90
AR 600-75	Exceptional Family Member Program	5 Jun 90
CIR 25-90-1	1990 Contemporary Military Reading List	25 May 90
JFTR	Joint Federal Travel Regulations, Vol. 1, Change 42	1 Jun 90
PAM 351-20	Army Correspondence Course Program Catalog	27 Apr 90
PAM 360-526	Once a Veteran (Rev. 1989)	
UPDATE 22	Reserve Components Personnel	1 Jun 90

By Order of the Secretary of the Army:

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